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THE UNIVERSITY OF ALBERTA

INCORPORATED NONPROFIT ORGANIZATIONS IN ALBERTA

BY

M. JOAN RIDDLE

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS.

FACULTY OF LAW

EDMONTON, ALBERTA

(FALL 1988)

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Peter [illegible]

Supervisor

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Date: June 24, 1988

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ABSTRACT

This thesis examines incorporated nonprofit organizations in Alberta by looking at their historical development in England and Alberta, by analyzing their essential and definitive corporate traits, and by reviewing Bill 54 which has been proposed to modernize and standardize some of Alberta's incorporated nonprofit organizations.

The thesis begins with a general statement regarding the participation of nonprofit organizations in our society, and the Alberta Government's initiative to update existing nonprofit legislation. There follows an examination of the origins of nonprofit organizations during medieval times in England, their evolution in England until the late 1800's, and their development during the 20th century in Alberta. The third chapter discusses the corporate nature of nonprofit organizations, including a consideration of the distribution constraint, the right to incorporate, limitations on purposes, the duties and responsibilities of directors and officers, and the rights of members. The fourth chapter presents both general and specific recommendations for the statutory treatment of incorporated nonprofit organizations in Alberta, as well as a discussion regarding the appropriateness of adapting business corporation law to nonprofit organizations. The final chapter concludes that Alberta's nonprofit laws can and should be updated, and that

it is possible to do so without compromising the essential nature of nonprofit organizations and without jeopardizing the interests and rights of their donors, members or beneficiaries.

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CHAPTER I - INTRODUCTION

Nonprofit organizations have been variously described as bastards of the corporate world,[1] neglected step-children,[2] and ugly ducklings.[3] They have generally received limited legislative attention as is evidenced by the fact that most of the Alberta statutes governing nonprofit organizations remain substantially unchanged since they were first enacted, some as long as 75 years ago. However, this plight is undeserved. Nonprofit organizations are significant participants in our society and economy. They provide many essential services as well as a variety of employment opportunities. The fact that they do so in a nonprofit setting is one reason why they have received so little legislative attention in a society where the focus has traditionally been on the pursuit of profit in commercial undertakings.

There are numerous groups and organizations which operate for purposes other than profit-making. These purposes may be charitable, educational, or recreational ...the undertakings may be food banks, day cares, or community leagues. In each case the raison d'être is task or purpose-oriented as opposed to profit-oriented. Planning and resources are developed and utilized so as to provide the best possible service or to produce the best possible product, not to make the most money.

Historically, nonprofit organizations in Alberta have received statutory recognition through an assortment of general, specialized, and private statutes. Recently, they have drawn the attention of Alberta's Institute of Law Research and Reform and of the Alberta Government Department of Consumer and Corporate Affairs. The Institute proposed a new statute to govern nonprofit organizations in Alberta,[4] and the Minister of Consumer and Corporate Affairs introduced the proposed statute on June 15, 1987 in the form of Bill 54, the Volunteer Incorporations Act.[5] If passed, Bill 54 will replace the Societies Act[6] and Part 9 of the Companies Act.[7] It will not replace the specialized and private nonprofit statutes which govern all the other incorporated nonprofit organizations outside the Societies Act and the Companies Act. The Institute "deferred" its consideration of these other nonprofit organizations in order to determine "whether the new scheme can be adapted to meet the special needs of such corporations and whether the Institute is the body which should undertake the necessary studies."[8]

The following discussions will trace the genesis and evolution of nonprofit organizations from Medieval times in England to the present day in Alberta. The relationship of the nonprofit organization to the business corporation will be examined, as will the essential and unique features of the nonprofit organization itself. Finally, general and specific recommendations will be made with respect to the most appropriate statutory treatment of nonprofit organizations for today's sophisticated and complex society.

FOOTNOTES - CHAPTER I

1. E.J. Mockler, "Charitable Corporations: A Bastard Legal Form" (1966) Can. Bar Assoc. Papers 229.

2. R.S. Lesher, "The Non-Profit Corporation - A Neglected Stepchild Comes of Age" (1967) Business Lawyer 951.

3. Id. at 951.

4. Institute of Law Research and Reform, Proposals for a New Incorporated Associations Act, Report No. 49, March 1987, Edmonton Alberta.

5. Bill 54, 21st Legislature, 2nd Session. The Minister of Consumer and Corporate Affairs, The Honourable Elaine McCoy, announced that she would be seeking public input on the Bill and would not be taking "legislative action" until the following fall or spring sitting of the Legislature. Alberta Hansard, Monday, June 15, 1987 at 1881.

6. Id. at s.178.

7. Id. at s. 176(b).

8. Institute of Law Research and Reform, "Draft Non-Profit Corporations Issues Paper," unpublished, September 29, 1986, Edmonton, Alberta at 1.

CHAPTER II - THE ORIGIN AND DEVELOPMENT OF NONPROFIT ORGANIZATIONS

In order to appreciate the proposed reform of Alberta's nonprofit laws it is necessary to understand first, the origin of nonprofit organizations, and second, the history of nonprofit laws in Alberta.

1. The Origin of Nonprofit Organizations

Present day nonprofit organizations enjoy many of the same benefits of incorporation as do their business corporation counterparts, including a separate legal existence and limited liability. However, notwithstanding some similarities in their evolution one cannot look at the history of business corporation law and thereby gain a complete understanding of the history of nonprofit organizations.

The first ancestors of the present day nonprofit organizations appear to be the early English Gilds.[1] The following excerpts from the introduction to English Gilds and from Dr. Lujo Brentano's essay in English Gilds on the "History and Development of Gilds, and the Origin of Trade Unions" explain the connection between the early English gilds and the present day nonprofit organizations:

The early English Gild was an institution of local self-help which, before Poor-laws were invented, took the place, in old times, of the modern friendly or benefit society; but with a higher aim, while it joined all classes together in a care for the needy and for objects of common welfare, it did not neglect the forms and the practice of Religion, Justice, and Morality.

'Gilds', were associations of those living in the same neighbourhood, and remembering that they have, as neighbours, common obligations. They were quite other things than modern partnerships, or trading 'Companies;' for their main characteristic was, to set up something higher than personal gain and mere materialism, as the main object of men living in towns; and to make the teaching of love to one's neighbour be not coldly accepted as a hollow dogma of morality, but known and felt as a habit of life.[2]

The family appears as the first Gild, or at least as an archetype of the Gilds. Originally, its providing care satisfies all existing wants; and for other societies there is therefore no room. As soon however as wants arise which the family can no longer satisfy- whether on account of their peculiar nature or in consequence of their increase, or because its own activity grows feeble - closer artificial alliances immediately spring forth to provide for them, in so far as the State does not do it. Infinitely varied as are the wants which call them forth, so are naturally the objects of these alliances. Yet the basis on which they all rest is the same: all are unions between man and man, not mere associations of capital like our modern societies and companies. The cement which holds their members together is the feeling of solidarity, the esteem for each other as men, the honour and virtue of the associates and the faith in them - not an arithmetical rule of probabilities, indifferent to all good and bad personal qualities. The support which the community affords a member is adjusted according to his wants - not according to his money-stake, or to a jealous debtor and creditor account; and in like manner the contributions of the members vary according to the wants of the society, and it therefore never incurs the danger of bankruptcy, for it possesses an inexhaustible reserve fund in the infinitely elastic productive powers of its members. In short, whatever and however diverse may be their aims, the Gilds take over from the family the spirit which held it together and guided it: they are its faithful image, though only for special and definite objects.[3]

The early English gilds which thus emerged and developed to meet the numerous and varied needs of society, can be divided into three categories. Social gilds were "founded upon the wide basis of brotherly aid and moral comeliness, without distinction (unless expressly specified) of calling or class, and comprehended a great variety of objects;"[4] craft gilds, which "while sharing the same principles, were formed for the benefit of the members as craftsmen, and for the regulation of their craft;"[5] and merchant gilds which were formed for the protection of liberty, property and trade.[6] Examples of these various types of gilds include those which provided for the burial of deceased gild members; some which provided food, clothing, and shelter for the poor, sick, infirm, and aged; others which helped those who had suffered losses by accident, robbery, or other misfortune; gilds which helped those in prison; gilds which repaired highways, roads, bridges and churches; gilds which protected the property of local merchants; and gilds which protected the activities and property of local craftsmen.[7] In these examples can be seen the forerunners of many of today's societies and nonprofit companies, including cemetery companies, the Salvation Army, the John Howard Society and other human service organizations, local chambers of commerce, professional associations, and trade unions.

There are also some similarities between the origins of the early English companies and the early English gilds, the merchant gilds in particular. The earliest ancestors of today's commercial companies appear to be the Medieval Guilds of Merchants,[8] which were in fact mutual self-help associations, as opposed to commercial enterprises. Merchant gilds protected the "liberty, property and trade" of town inhabitants from such outside forces as neighbouring nobles, robbers, surrounding inhabitants, and foreign traders.[9] Many of these gilds eventually obtained charters from the Crown to protect their particular branch of trade,[10] but each gild merchant traded as an individual, and not on behalf of the gild. The first English companies were the overseas trading companies, referred to as regulated companies, which were "virtually extensions of the gild principle into the foreign sphere."[11] It was not until the partnership principle of trading on joint account, as opposed to individual trading, "invaded" the regulated companies that the trading companies "became joint commercial enterprises instead of trade protection associations."[12] The joint stock companies which thus emerged in the latter part of the 1600's are the forerunners of today's modern business corporations.[13]

Although the modern company shares an early commonality with one type of gild, the merchant gild, the evolution of the commercial company and the gild differ in one significant respect - the focus of the company was profit, while the focus of the gild was help and support.

The early English gild eventually met its demise under the Act of 37 Henry VIII c.4(1545) and the Act of I Edward VI c.14(1547).[14] Under these Acts the land and property of all gilds, except the trading gilds, became vested in the Crown. It seems that the properties thus seized were to be put to "more godly and virtuous purposes," which, at least during the time of the Act of 37 Henry VIII c.4, meant "the maintenance of these present wars."[15]

The end of the gilds by the confiscation of their property did not end forever the coming together of people for mutual self-help and support. As the gilds faded, friendly societies began to emerge. Although there are records of friendly societies in the mid-1600's,[16] it was not until the end of the 18th century that they were firmly established as a major social institution, there being several thousand benefit clubs and other friendly societies by that time.[17]

By the 19th century friendly societies were numerous and were significant participants in English society.[18] However, with growth came the attendant problems of administration, and the consequent need for state regulation. J.M.

Baernreither describes these developments in the following terms:[19]

> It would be unjust to undervalue the influence exercised on this course of development by legislation and State supervision, only that influence must be rightly understood. It is not legislation that dictated to the Friendly Societies their line of march, but the efforts of those societies for reform led to facts which required legal regulation, situations arose out of which legislation had to extricate them, and it was not until the last few decades that Parliament gave expression to the idea that these social institutions, which had grown by their own strength into great self-governing bodies, required some supervision from the State. Legislation has not created these institutions, but, on the contrary, their growth has necessitated legislation.

The Select Committee of the British House of Commons in its Report in 1825 also commented upon the development of legislation to regulate friendly societies.[20]

> It began by laying down the principle that it was only in consideration of the advantages conferred by law "that any restrictive interference can be justified with voluntary associations established for lawful and innocent purposes." Although the restrictions imposed by the Friendly Societies Act were "without exception calculated for the benefit and security of individuals, nevertheless...it is for the individuals themselves to determine whether to adopt the provision of the statute, which offers them at the same time regulation and privilege, or to remain perfectly unfettered by anything but their own will, and the common or more ancient law against fraud or embezzlement. For your Committee apprehend that although the Act of 1793 appears to being rendering lawful the institution of Friendly Societies, there neither was at that time, nor is now, any law or statute which deprives the King's subjects of the right of associating themselves for mutual support."

These accounts of the development of friendly societies legislation indicate that its development was a " continual compromise between...two opposite tendencies...the desire for independence...and the conviction that...the problems of modern society can never be solved on an extensive scale without some further intervention by the State."[21] For example, the preamble to the Act of 1793, the first piece of legislation to regulate friendly societies, stated that it was everyone's right to form societies for mutual self-help, thereby "diminishing the publick burthens," but provided that the rules and regulations of such societies must be approved by local justices administering the law.[22] Similarly, the Act of 1819 provided that people should be encouraged to help themselves and each other in order to reduce reliance on the poor rate, but that the method of doing so was to be more closely supervised than under previous acts.[23]

A comprehensive survey of the position of friendly societies in England was made between 1871 and 1874. A Royal Commission was appointed to study the operation of existing legislation, the organization and condition of the societies established under this legislation, and the office and duties of the Registrar of Friendly Societies.[24] The Royal Commission on Friendly and Benefit Building Societies made recommendations for the reform of the laws relating to friendly societies,[25] and these recommendations formed the basis of the Friendly Societies Act of 1875.[26] The primary purpose of the recommendations was "to make the societies which registered more reliable as insurers and to achieve this by more efficient management of their financial affairs."[27] This new Act continued with a system of voluntary registration, and broadened the purposes for which a friendly society could be registered.[28] This included friendly societies formed to provide help and support for members suffering from physical or mental illness, for members travelling to obtain employment, for members in distressed circumstances, for members suffering losses due to shipwreck, and for insuring workmen's tools and implements of trade against fire.[29] Also included were cattle insurance societies, benevolent societies, burial societies, endowment societies, working men's social clubs, and societies for any purposes for which it was determined that the Act ought to be extended.[30] In fact, the Act of 1875 did not place limits on the purposes for which friendly societies could be formed, it "simply recognised all the functions of the different societies."[31]

The evolution of nonprofit organizations was also affected by the development of charitable organizations. The first type of corporation was the ecclesiastical corporation which was formed during medieval times for "the furtherance of religion and for perpetuating the rites of the Church."[32]

Church tithes and donations were used to provide almshouses, doles, elementary education for the poor, and homes of residential care for the poor, the aged, and the chronically sick and disabled.[33] Eleemosynary corporations, which also emerged in medieval times, were also directed to the relief of poverty and distress due to sickness or other afflictions, and generally took the form of hospitals or colleges.[34] By the 16th century the charitable trust had begun to emerge as the "major legal mechanism of institutionalized private philanthropy."[35] Chesterman in Charities, Trusts and Social Welfare explains that this occurred because of the decline of the Church's power and influence and the establishment of the bourgeoisie and landless proletariat as major new social classes between the Middle Ages and the sixteenth century.[36] Moneys which would previously have been given to the Church and ecclesiastical corporations were increasingly being given or bequeathed to secular welfare purposes which were increasing due to the breakdown of feudalism and the resulting number of dispossessed tenants migrating to the towns. At this time the merchant class was growing rich and had more money for philanthropic purposes which, through the charitable trust, it was able to donate for specific "socially useful" purposes as opposed to the unspecified purposes to which church donations were put.[37]

The charitable trust continued to be an important vehicle for charitable activity. However, other legal forms also developed, including unincorporated associations, companies limited by guarantee under the 1862 Companies Act, and friendly societies, many of which had philanthropic purposes.[38] These three forms of organization raised their funds from members' subscriptions and public appeals, as opposed to the charitable trusts which were established with private bequests. The purposes for which all of these charitable organizations could be established were determined by the preamble to the Statute of Charitable Uses 1601,[39] and its interpretation in Morice v. Bishop of Durham,[40] and Commissioners of Income Tax v. Pemsel.[41] In Pemsel's case Lord Macnaghten gave the following description of "charity":

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[42]

In summary, it is apparent that by the end of the 19th century there were several alternative forms of nonprofit organizations. The friendly societies were the well-established descendants of the early English guilds and continued to meet various need of society through mutual self-help and mutual insurance. The charitable trust and other forms of private philanthropy provided relief from poverty, and the advancement of education, religion, and other purposes of benefit to the public. As well, companies limited by guarantee and unincorporated associations undertook philanthropic activities. These were the forms of nonprofit organizations which existed in England when English law was adopted in Canada,[43] and it is these corporate forms which were adapted to the particular needs of Alberta's emerging society in the early 20th century.

2. The History of Nonprofit Organizations in Alberta

Nonprofit organizations in Alberta evolved along three lines - societies, nonprofit companies, and specialized and private act societies and companies. The following discussion will examine the development of these corporate forms from Alberta's birth as a province in 1905 to the present.

2(a) Societies

The first societies to be incorporated after Alberta became a province were incorporated under ordinances of the Northwest Territories[44] which continued in the new province until they were modified by Alberta legislation.[45] The two Northwest Territories Ordinances respecting societies became Alberta statutes in 1908 and 1922,[46] and were subsequently repealed in 1924 when Alberta enacted its own Societies Act.[47]

The societies formed under Alberta's 1924 Societies Act were not the same as those formed under the Friendly Societies Act of 1875 in England. The majority of the friendly societies in England were mutual insurers - they provided various forms of insurance to their members. This type of society was provided for in Alberta in the Alberta Insurance Act of 1915,[48] and continues to be provided for in the present Insurance Act under the headings "Fraternal Societies" and "Mutual Benefit Societies".[49] Societies formed in Alberta under the 1924 Societies Act were mutual benefit organizations without the mutual insurance component.

Under the 1924 Societies Act a society could be formed for any "benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting, or other useful purpose, but not for the purpose of carrying on any trade or business."[50] This clause is very similar to the federal provision governing companies incorporated for purposes other than pecuniary gain under the federal Companies Act in force in 1917.[51] It also includes the "benevolent and provident" purposes from the repealed Benevolent Societies Act,[52] and the artistic and literary purposes from the repealed Mechanics' and Literary

Institutes Act.[53] Because there were no formal records of the proceedings in the Alberta Legislature at this time,[54] it is impossible to say with certainty how this list of purposes was developed. However, it is submitted that the similarities in wording between the new Societies Act provision and the wording in the federal Companies Act, the repealed Benevolent Societies Act and Mechanics' and Literary Institutes Act, indicates that the new provision was the result of a simple combination of those provisions designed to broaden the scope of the legislation. Such a broad application would certainly be in keeping with the equally broad application of the Friendly Societies Act of 1875 in England.

The 1924 Societies Act has been revised and consolidated a number of times since it was first enacted.[55] However, today it is essentially the same statute functionally, the major amendments having been administrative in nature.[56] For example, the purposes for which a society can be formed under the present Societies Act[57] are identical to those for which a society could become incorporated under the 1924 Societies Act.[58] Similarly, both the 1924 and 1980 Statutes prohibit societies from having share capital, declaring dividends, and distributing property among the members during the existence of a society.[59] For example, the application for the incorporation of the Edmonton Art Gallery, which was incorporated on August 13, 1924 as the Edmonton Museum of Arts, stated that the purposes of the Association would be "to promote the knowledge and enjoyment of and cultivation of the fine Arts and to preserve historic relics. No pecuniary gain or profit shall accrue from membership in the Association."[60] Similarly the application to form the Garneau/University Child Care Centre Society, which was incorporated on April 25, 1986, stated that the purpose of the Society was "to establish and maintain a pre-school child care centre licenced under the Alberta Day Care Regulation, operating as a non-profit organization."[61]

Other functional elements which are the same or essentially the same in both the 1924 and 1980 Societies Acts include the discretion of the Registrar to refuse incorporation for any reason that appears to him to be sufficient,[62] a power that has rarely been exercised. Although there are no reported cases on this point, nor are written records kept by the Corporate Registry at the Department of Consumer and Corporate Affairs regarding the Registrar's discretion, it appears that the Registrar has exercised his discretion in only a few instances.[63] For example, incorporation of a society has been refused where incorporation was determined to be more appropriate under Part 9 of the Companies Act. Incorporation has also been refused where it was discovered that the applicant rooming house owners were seeking to set up gambling rooms to make money under the guise of charitable organizations.

Other functional elements which are substantially the same in both the 1924 version and the 1980 version of the Societies Act include the powers of a society,[64] the provisions for the limited liability of a society's members,[65] and the right to establish branch societies.[66]

The differences between the 1924 and the 1980 Societies Act include the method of choosing a name for a society. Under the 1924 statute the chosen name was indicated on the application for incorporation which was accepted or rejected by the Registrar according to his "uncontrolled discretion to refuse incorporation for any reason which may appear to him to be sufficient," including, presumably, the name of the society.[67] Under the 1980 version of the Societies Act, a society must comply with the circumstances and conditions prescribed by regulations which govern the choice of names for societies in Alberta.[68] Other administrative differences include the procedure for the dissolution of a society,[69] and the requirement that a society keep a register of its members at its registered office, and make it available to the members of the society.[70]

When considering the development of the Societies Act in Alberta it is appropriate to look to England for its ancestry. However, the types of societies which have been formed here and the legislation governing them are not identical to any one type of society or any one piece of societies legislation which existed in England when English law was introduced into Alberta. Rather, the Alberta version of societies seems to be a synthesis of charitable organizations, volunteer associations, and friendly societies minus their mutual insurance component. Because of the broad purposes clause in Alberta's Societies Act, societies can undertake the broad range of activities carried out by their English ancestors, but under the authority of only one statute.

2(b) Nonprofit Companies

Nonprofit companies were first given statutory recognition in England in the Joint Stock Companies Act of 1856 as companies that were "not for the Time being carrying on a Trade or Business having Gain for its Objects."[71] They were similarly recognized in the Companies Act 1862 as companies "formed for the Purpose of promoting Art, Science, Religion, Charity, or any other like Object, not involving the Acquisition of Gain."[72] The Companies Act, 1862 also made it possible to incorporate a company limited by guarantee,[73] a corporate form used by charitable organizations.[74]

Nonprofit companies emerged in Alberta as specially adapted companies under the Companies Act, 1913.[75] This Act amended the 1901 Companies Ordinance[76] by adding the following provision in which the portion describing a nonprofit company is identical to that in the English Companies Act, 1862.

> Where any association has been or is about to be formed as a limited company if it proves to the Registrar that it is for the purpose of promoting art, science, religion, charity or any other useful object, and that it is the intention of such association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association the registrar may direct such association to be registered with limited liability without the addition of the word limited to its name...[77]

The Companies Act, 1913 also provided for the incorporation of companies "formed solely for the purpose of promoting recreation among its members."[78] These two sections appear in Part 9 of the present Companies Act which applies to "Companies With Objects Other Than the Acquisition of Gain."[79]

The development of the nonprofit company in Alberta has been more straightforward than the development of the society. While the historical background of the society includes several types of organizations which developed over several hundred years, the genesis of the nonprofit company, at least statutorily, can be traced through the English Companies Acts.

2(c) Specialized Nonprofit Organizations

There are several types of nonprofit organizations which are incorporated under specialized statutes designed to meet the individual needs of these organizations. They include agricultural societies, religious societies, Women's Institutes, cemetery companies, and co-operative associations.

2(c)(i) Agricultural Societies

Agricultural societies were significant participants in the settlement and development of Alberta.[80] They were first formed to support, protect, and promote agriculture through fairs and exhibitions. Fairs and exhibitions were very useful because they encouraged competition, expanded markets, and induced immigration and settlement. They did this by demonstrating the quality of livestock, produce, and crops in a given area and therefore its fertility.[81] The Edmonton Agricultural Society, which was the sponsor of Edmonton's first exhibition on October 15, 1879, was the first agricultural society to be formed in Canada's Northwest.[82] It eventually ceased operations and was replaced by a for-profit company, the Edmonton Industrial Exhibition Association Ltd., which was incorporated in 1899. This was the forerunner of today's Edmonton Northlands which co-sponsors Edmonton's annual summer exhibition with the Klondike Days Association, a nonprofit company incorporated in 1965 under Alberta's Companies Act.

Alberta's Agricultural Societies Act, which was first enacted in 1903,[83] provides for the incorporation of societies to encourage improvement in agriculture, horticulture, homemaking, and the quality of life in the agricultural community.[84] On July 3, 1987 there were 290 active agricultural societies in the province of Alberta.

2(c)(ii) Religious Societies

Religious societies in Alberta are governed by the Religious Societies' Land Act.[85] This statute provides two alternatives for the holding of church lands. Unincorporated religious societies can hold land for church buildings, burial grounds or public worship and the propagation of knowledge, through the appointment of trustees.[86] Religious societies can also hold church lands by becoming incorporated congregations and holding the lands themselves.[87] For example, The Immanuel Lutheran Church of Tomahawk, Alberta became incorporated under the Religious Societies' Land Act on December 27, 1963. They included the following clause in their Declaration of Incorporation regarding the matter of church property:

> The Church Council shall not buy, sell or encumber real estate unless authority is given by the congregation. Nor shall it, without authority incur any extra budgetary financial obligation exceeding Fifty ($50.00) Dollars.[88]

The total number of active incorporated religious societies on September 9, 1987 in Alberta was 1,587, 18 of which were new incorporations in 1987.

2(c)(iii) Women's Institutes

Like agricultural societies, women's institutes were a significant participant in Alberta's early history. They were originally started to "assist women's work on the farms and in the home" when the courses and meetings offered by the Department of Agriculture to farm men were being increasingly attended by farm women as well.[89] It was thought that a system of women's institutes should be organized "having as their object the simplifying of all problems pertaining to the home, and consequent achievement of better home conditions and the increase of the general fund of comfort, health, and efficiency."[90] In fact the women's institutes came to be much broader in scope than this and were known unofficially as the "Rural Women's University."[91] Not only did they provide an opportunity for social interaction for often isolated rural women, they also provided many educational programs on subjects pertinent to the work and activities of farm women in Alberta in the early 20th century.[92]

The Women's Institute Act was first enacted in 1916.[93] In addition to giving legislative effect to that which had already been established, the Act was thought to be necessary in order to give Women's Institutes the power to hold property in the names of the Institutes themselves rather than in the names of the individual trustees, as had been the case.[94] In 1922 the Women's Institutes, which were originally organized under government patronage, were made independent of the government, ostensibly to give them "a greater amount of freedom, and to get them further from the control of the department [of agriculture]."[95] The proposed amendment also vested with the Department of Agriculture the responsibility for providing the kinds of services provided by the Women's Institutes so that the "extension work that had been carried on in the past under the Women's Institutes would be available now to all women's clubs."[96] It also replaced the Superintendent of Women's Institutes with a Supervisor of Women's Societies responsible for the supervision of women's groups other than the Women's Institutes, and eliminated the financial support of the Women's Institutes previously provided by the Department of Agriculture. These amendments were hotly debated in the Legislature for several days in March of 1922. Nellie McClung, Liberal member for Edmonton, argued that in light of the quality of service provided by the Women's Institutes to their members and the public at large, the government's money had been well spent.[97] She further argued that there was no need for the government to make general application of the services provided by the Women's Institutes, except in those isolated places where there were no Women's Institutes.[98] Notwithstanding the opposition to the proposed amendments, they were passed on March 18, 1922 and Women's Institutes in Alberta became independent of the government.[99]

The present Women's Institute Act has changed little since 1922. It provides for the establishment of a central corporate body or council and individual local institutes which together comprise the Alberta's Women's Institutes.[100] Women's Institutes continue to be active in Alberta, there being 156 branches with approximately 2,500 members in 1987.

2(c)(iv) Cemetery Companies

Cemetery companies are nonprofit companies which operate cemeteries. They are rooted in England with the early English gilds responsible for the burial of the dead. In Alberta they were first provided for in the Cemeteries Ordinance of 1898.[101] It became an Alberta statute in 1922,[102] and was eventually split into the Cemeteries Act and the Cemetery Companies Act.[103] The present Cemetery Companies Act provides for the establishment of public cemeteries by companies specifically incorporated "for the purpose of establishing one or more public cemeteries."[104] For example, the objects of the Rife Memorial United Church Cemetery, which was incorporated on August 9, 1977, are "to establish, maintain and supervise and take care of all matters related to a cemetery located" in the Municipal District of Bonnyville.[105] On September 9, 1977 there were 237 cemetery companies in Alberta.

2(c)(v) Co-operative Associations

Co-operative associations, which are not usually considered to be nonprofit organizations, can be included in this category in the case of those co-ops which operate on a nonprofit basis, by having something other than the generating of profit as their purpose, and by prohibiting the distribution of profit to its members. The Co-operative Associations Act was first enacted in 1913,[106] and was considered to be "advanced legislation."[107]

2(c)(vi) Private Act Nonprofit Organizations

In addition to the specialized categories of nonprofit organizations there are also several individual nonprofit organizations which are created and governed by their own statutes. They include churches, masonic lodges, foundations and private clubs. Some examples of these organizations include the Lethbridge Foundation,[108] the Calgary and District Foundation,[109] the Elks Club of Edmonton,[110] and the Historical Society of Alberta.[111]

By having their own incorporating statute groups which may not fit appropriately within the four corners of any existing statute will still be able to enjoy the benefits of incorporation. For example, the Lethbridge Foundation Act contains a provision which gives the Foundation the "powers and privileges and immunities vested by law in a corporation, necessary or proper for the carrying out of its objects."[112] It also contains a provision exempting it from seven particular sections of the Companies Act.[113] Similarly, the Historical Society of Alberta Act was enacted at a time when the existing societies legislation did not specifically contemplate the objects which the Historical Society wished to undertake.[114]

Private act incorporations in Alberta are many and varied. However, because there is no requirement to file information with Corporate Registry, there is no way of knowing with any certainty the number of active private act nonprofit organizations which exist in Alberta.

3. Inconsistency and Overlap Between Alberta's Nonprofit Statutes

3(a) Administrative

Nonprofit organizations have at least eight statutory ways of coming into existence.[115] Each statute has its own requirements for the administration, operation and management of the type of organization which it governs, a situation which has potential for conflict, inconsistency and overlap between the statutes. The Institute of Law Research and Reform has recommended that some of this should be eliminated.[116] For example, it has been suggested that inconsistent reporting and filing requirements can result in inconsistent government surveillance and supervision, a situation which is especially significant with respect to those nonprofit organizations which operate with public funds and charitable donations.[117]

Another administrative consideration is the sheer convenience for the government departments which monitor nonprofit organizations. At present the Corporate Registry offices of Alberta's Department of Consumer and Corporate Affairs administer the Societies Act, the Companies Act, the Cemetery Companies Act, the Religious Societies' Land Act, and those private act organizations which choose to register with Corporate Registry.[118] Agricultural societies are administered by Alberta's Department of Agriculture,[119] while Women's Institutes are administered by their own independent council.[120] The administration of Alberta's nonprofit organizations would obviously be streamlined if they were all administered by one government department.

3(b) Substantive

There are also certain substantive law issues which would support the suggestion for the reform of Alberta's laws governing nonprofit organizations. Following is a discussion of these issues, including the holding of land, the use of assets, limitations on purposes, and the right to incorporate.

3(b)(i) Holding of Land

There is presently some inconsistency between the Religious Societies' Land Act and the Cemetery Companies Act with respect to the holding of lands. Real property which is owned by an unincorporated congregation or religious society can be held by trustees appointed under the Religious Societies' Land Act[121] or by trustees appointed under the Cemetery Companies Act.[122] However, trustees appointed under the Religious Societies' Land Act are deemed to be a corporation,[123] while those appointed under the Cemetery Companies Act are not. If this lack of corporate status were a problem for the trustees appointed under the Cemetery Companies Act the obvious solution would be to become incorporated under section 2 of that Act. If incorporation was not desirable or appropriate the religious society or congregation could have trustees appointed pursuant to the Religious Societies' Land Act instead, thereby achieving deemed corporate status without the necessity of incorporation.

It could be argued that this particular inconsistency is of little consequence since it is fairly easy to remedy. However, it is also arguable that no purpose is served by it, that it may simply be the result of an oversight in legislative drafting, and would therefore benefit by being rectified in a standardized statute.

3(b)(ii) Use of Assets

Another area of potential confusion relates to the use to which church assets may be put. If a religious society or congregation chooses to incorporate it may do so under the Cemetery Companies Act, the Religious Societies' Land Act, or the Companies Act. If it chooses the Cemetery Companies Act it "may form a company for the purpose of establishing one or more public cemeteries" and must use its land for that purpose.[124] If it chooses to become incorporated under the Religious Societies' Land Act, it may become "incorporated for the purpose of holding and dealing with real and personal property," there being no restriction on the use to which the land is put, other than it be used "for the purposes of the congregation."[125] If the religious society or congregation chooses to incorporate under the Companies Act, it will be restricted in its purposes and the use of its lands only to the extent provided in its own objects and by-laws. While these inconsistencies may be considered confusing for religious societies and congregations desirous of incorporation, they might also be considered somewhat advantageous to the extent that they provide a range of alternatives to would-be incorporators.

3(b)(iii) Limitations on Purposes

There is also some inconsistency between the Companies Act and the Societies Act regarding the purposes for which incorporation is permitted. While under the Societies Act a society can only be incorporated for certain specified purposes, and cannot carry on a trade or business,[126] a nonprofit company incorporated under the Companies Act is not restricted in this way, other than if it wishes to dispense with the word "limited" in its name.[127] In practical terms this means there could be a society and a nonprofit company pursuing similar activities with similar financial needs, but with dissimilar opportunities to raise funds to meet those needs. The nonprofit company would be permitted to undertake any lawful activity, including carrying on a trade or business to achieve its purposes and meet its needs, while a society would be restricted to the statutory non-trade and non-business activities.

The Institute of Law Research and Reform is of the opinion that this inconsistency is inappropriate and has recommended that no limitation be put on the purposes for which an association may be incorporated under Bill 54, the proposed Volunteer Incorporations Act.[128] However, they have recognized that because members and others who donate funds to an organization for a certain purpose have a right to be assured that their money is being proper~~ly used~~, the organizations must state and act within those stated purposes.[129]

3(b)(iv) The Right to Incorporate

Yet another area of inconsistency between the nonprofit statutes in Alberta exists with respect to the matter of discretionary incorporation and incorporation as of right.[130] Under the Societies Act[131] and the Cemetery Companies Act[132] the Registrar of Corporations has the discretion to "refuse incorporation for any reason that appears to him to be sufficient." Incorporation under the Agricultural Societies Act is also discretionary,[133] as is incorporation under the Women's Institute Act,[134] although these sections are not worded so broadly as are those in the Societies Act and the Cemetery Companies Act. The Companies Act and the Religious Societies' Land Act are statutes under which incorporation is a matter of right if the registration requirements have been met, as in the case of the Companies Act,[135] or if there has been "substantial compliance" with the incorporation requirements, as in the case of the Religious Societies' Land Act.[136]

Again, the Institute of Law Research and Reform has recommended that these inconsistencies, at least as they exist between the Societies Act and the Companies Act, should be eliminated. The Institute has recommended that incorporation be granted once the incorporating documents have been provided to the Registrar of Corporations.[137]

3(b)(v) Conclusion

While it cannot be denied that there are many examples of inconsistency and overlap in the existing nonprofit statutes, it is also apparent that not all of them lead to conflict. In some cases the inconsistency and overlap provide choices which might not be available under one all-encompassing statute. In other cases the differences exist because of inherent differences between the various types of nonprofit organizations, some of which are so specialized as to require a statute of their own. It is arguable that merging all nonprofit organizations, or even just two or three depending on which ones, would homogenize the individual character and identity of each; that one omnibus statute could not effectively provide for the different functions and needs of agricultural societies, cemetery companies, women's institutes, religious societies, nonprofit companies, and societies in general; and that the effort to modernize and standardize with a uniform nonprofit statute should be tempered by a recognition of the risk that such reform could also sterilize an area of activity characterized by diversity. The challenge is to recognize and retain the diversity which has contributed to the success of nonprofit organizations, while at the same time recognizing and reforming that which has been counterproductive.

An examination of the origin and development of the different statutory forms of nonprofit organizations does not give a complete picture of the diversity in the nonprofit sector. Nonprofit organizations must also be examined in the context of how they are classified or categorized. The following discussion focuses on the various ways of categorizing nonprofit organizations.

4. Categories of Nonprofit Organizations

There are a number of ways in which nonprofit organizations in Alberta can be categorized. They can be categorized historically according to the types of organizations which emerged in England and evolved statutorily in Alberta. They can also be categorized according to the purposes for which they are permitted to be formed, a categorization which is similar to that based on the historical evolution of nonprofit statutes in Alberta since the purposes are statute-based. Nonprofit organizations can also be categorized according to the method by which they receive their funding as well as according to how they are controlled. And finally, nonprofit organizations can be categorized according to whether they operate for the benefit of their members or for the benefit of the public. Both the historical categorization and the categorization according to purpose have been discussed in the first two sections of this chapter. The following discussion will therefore focus on the categorization of nonprofit organizations on the basis of their funding sources, who controls them, and on the basis of who they benefit.

The noted American theorist in the field of nonprofit organizations, Henry Hansmann, draws a distinction between "donative" and "commercial" nonprofits.[138] "Donative" nonprofits "receive all or most of the income in the form of grants or donations" while "commercial" nonprofits "receive the bulk of their income from prices charged for their services."[139] Hansmann includes in the former category organizations for the relief of the needy, such as the Salvation Army, and in the latter category includes nursing homes and hospitals.[140] He points out that because some organizations can fit both categories, the donative and commercial categories should not be considered "mutually exclusive and exhaustive categories."[141]

In the Alberta context Hansmann's "donative" nonprofits would also include our Salvation Army, as well as other organizations for the needy like the Food Bank, the Christmas Bureau of Edmonton and the Emergency Relief Shelter. "Commercial" nonprofits would include private nursing homes but hospitals would be an example of a nonprofit organization which would fit into both categories. In fact, many of Alberta's nonprofit organizations would fit into both categories due to the amount of public funds in the form of grants and subsidies from tax dollars which are given to nonprofit organizations. For example, many nonprofit daycares and other child care facilities receive government subsidies and operating grants in addition to the fees received from parents.

With respect to the categorization based on control, Hansmann draws a distinction between "mutual" and "entrepreneurial" nonprofit organizations noting that like donative and commercial nonprofits, these categories are also ends of a continuum.[142] He defines a "mutual" nonprofit as one which is controlled by its patrons, and an "entrepreneurial" nonprofit as one which is controlled by a "self-perpetuating board of directors".[143] Hansmann includes in the former category country clubs in which the members elect their directors, and includes in the latter category hospitals and nursing homes whose members or customers have no voice in who is elected to the board of directors.

Hansmann's categories and examples would also apply in Alberta. Many nonprofit organizations are controlled by the members, who, in the small organizations all sit on the board of directors, and in the larger organizations elect the directors from amongst the membership. Examples include social and recreational clubs, community leagues, and churches. Examples of entrepreneurial nonprofits in which the board is self-perpetuating include the various hospitals in Alberta, as well as the universities.

Hansmann suggests that these four categories can form a matrix into which all non profit organizations can be placed. The resulting categories are donative-mutual, donative-entrepreneurial, commercial-mutual, and commercial-entrepreneurial. As a tool for definition and classification these categories may be helpful. However, the most common way of categorizing nonprofit organizations is according to who receives the benefit of the services which they provide. The distinction is drawn between mutual benefit or membership organizations, and public benefit or charitable organizations and has found statutory form in Canada and the United States. In Canada the proposed Canada Not-For-Profit Corporations Act[144] and Saskatchewan's Not-For-Profit Corporations Act[145] both distinguish between membership and charitable organizations. In the United States a similar distinction is made in New York's Not-For-Profit Corporation Law,[146] the Alaska Nonprofit Corporations Act,[147] and the California Nonprofit Corporations Act,[148] which adds another category for religious corporations.

A mutual benefit or membership nonprofit organization refers to an organization which exists for the benefit of its members, "although the benefit must necessarily be a non-pecuniary benefit."[149] It generally has little involvement with the public and concentrates its attention on its members. Social clubs, sports clubs and professional associations are examples of mutual benefit or membership organizations. In the result they are the same as Hansmann's mutual nonprofits, although his category is defined by who controls the organization, while the defining characteristic of the mutual benefit category is the recipient of the organization's services.

A public benefit or charitable nonprofit organization is one which undertakes charitable work which does not benefit the members personally, but is intended to benefit the community at large[150] or a defined segment within the community. It includes organizations which meet Lord

Macnaghten's common law test for charities in Commissioners for Special Purposes of the Income Tax v. Pemsel:[151]

> "Charity" in its legal sense comprises four principal divisions:...the relief of poverty...the advancement of education...the advancement of religion; and...other purposes beneficial to the community not falling under any of the preceding heads.

There are numerous examples of public benefit or charitable organizations. The United Way distributes the donations it receives to hundreds of such associations each year.

5. Conclusion

The history of nonprofit organizations cannot be traced by examining the development of one particular legal structure. Nonprofit organizations are diverse historically, having the early English gilds, ecclesiastical corporations, friendly societies, nonprofit companies, and unincorporated associations as their ancestors. Their history and development in Alberta is equally diverse. The nonprofit community of organizations is composed of the societies and nonprofit companies created by the general statutes, as well as many specialized societies and nonprofit companies created by specialized and private acts. As a result of this diversity there is some attendant overlapping and inconsistency and the potential for conflict and confusion.

It has been recommended that this situation should be remedied by standardizing at least some of the nonprofit legislation. While there may be some merit in this recommendation, the decision to provide a uniform nonprofit statute cannot be taken on this basis alone. The different bases upon which nonprofit organizations can be categorized indicate the different perspectives from which they can be examined. They also demonstrate that nonprofit organizations are recognizable and distinct organizations as amongst themselves, and as between themselves and their counterparts in the business world. The characteristics which make nonprofit organizations distinct and recognizable in the corporate world must also be examined in order to determine how they might best be accommodated by legislation.

FOOTNOTES - CHAPTER II

1. The Origin of Nonprofit Organizations

1. L.T. Smith, English Gilds (1870) xiv.

2. Id. In this passage the author quotes from a work by her father Toulmin Smith, Traditions of the Old Crown House (1863) 28.

3. Dr. Lujo Brentano, "History and Development of Gilds, and the Origin of Trade Unions," in supra n. 1 at lxxx. See also J.M. Baernreither, English Associations of Working Men (1889) 165 for another account of the origin of modern nonprofit organizations.

4. Supra n. 1 at xxvii.

5. Id.

6. Supra n. 3 at xciii.

7. Supra n. 1 at xxxviii

8. Gower, Principles of Modern Company Law (1979) 23.

9. Supra n. 3 at xciii.

10. Supra n. 8.

11. Id.

12. Supra n. 8 at 24.

13. Bruce Welling, Corporate Law in Canada (1984) 35.

14. Supra n. 1 at xliii.

15. Supra n. 1 at xlii and xliii.

16. Jack C. Ross, An Assembly of Good Fellows: Voluntary Associations in History (1976) 246; P.H.J.H. Gosden, Self-Help: Voluntary Associations in the 19th Century (1976) 6.

17. P.H.J.H. Gosden, Self-Help: Voluntary Associations in the 19th Century (1976) 9. According to a Report of the Select committee of the British House of Commons in 1825, there were 9,672 Friendly Societies registered with 925, 429 members. Fourth Report of the Royal

Commission on Friendly and Benefit Building Societies 1875, Appendix I.

18. For example, by 1872 there were 21,819 Friendly Societies with 1,857,896 members. However, it was felt that this was likely inaccurate since registration of Friendly Societies was voluntary. Fourth Report of the Royal Commission on Friendly and Benefit Building Societies, 1875, Appendix I.

19. J.M. Baernreither, English Associations of Working Men (1889) 166.

20. Report of the Select Committee of the House of Commons, July 1825, quoted in the Fourth Report of the Royal Commission on Friendly and Benefit Building Societies, Appendix I.

21. Supra n. 19 at 298. There were twenty statutes passed pertaining to Friendly Societies between 1793 and 1875. The most significant of these included the Act of 1793 (33 Geo. III c.54); the Act of 1819 (59 Geo. III c.128); the Act of 1829 (10 Geo. IV c.56); the Act of 1834 (4 & 5 William IV c.40); the Act of 1835 (5 & 6 William IV c.23); the Act of 1836 (6 & 7 William IV c.32); the Act of 1846 (9 & 10 Vict. c. 27); the Act of 1850 (13 & 14 Vict. c.115); the Act of 1855 (18 & 19 Vict. c.63); and the Act of 1875 (38 & 39 Vict. c.60). J.M. Baernreither, English Associations of Working Men 1889 at 302 to 313.d

22. Act of 1793, 33 Geo. III, c.54.

23. Act of 1819, 59 Geo. III, c.128.

24. P.H.J.H. Gosden, The Friendly Societies in England, 1815 - 1875 (1961) 183.

25. Four Reports of the Royal Commission on Friendly and Benefit Building Societies, 1871 - 1874, British Parliamentary Papers, Irish University Press Series, 1970.

26. 38 & 39 Vict., c.60.

27. Supra n. 24 at 185.

28. Voluntary registration was introduced in the first statute to regulate Friendly Societies, the Act of 1793 (33 Geo. III c.54), referred to as Rose's Act. By 1875 registration was rewarded with a variety of advantages including exemption from stamp duties, certain civil and

criminal procedure protections, and certain advantages with respect to the investment of funds. Supra n. 19 at 329.

29. Margaret Fuller, West Country Friendly Societies (1964) 34.

30. Id. See also supra n. 19 at 314.

31. Supra n. 19 at 314.

32. S.G. Maurice and D.B. Parker, Tudor on Charities (7th ed. 1984) 312.

33. Michael Chesterman, Charities, Trusts and Social Welfare (1979) 11 & 12.

34. Supra n. 32 at 313.

35. Supra n. 33 at 14.

36. Supra n. 33 at 14 - 18.

37. Supra n. 33 at 17.

38. Supra n. 33 at 47.

39 Id.

38. Supra n. 33 at 48.

39. The Statute of Charitable Uses 1601 is also referred to as the Statute of Elizabeth I.

40. (1805) 9 Ves. 399; 10 Ves. 522.

41. [1891] A.C. 531.

42. Id. at 583. This description is still relied on in Canada as the primary test to determine whether an organization can qualify as a charitable organization for income tax purposes. See A.B.C. Drache, Canadian Tax Treatment of Charities and Charitable Donations (2nd ed. 1980) 4.

43. J.E. Cote, "The Introduction of English Law Into Alberta" (1964) 3 Alberta L. Rev. 262 at 264-265.

2. The History of Nonprofit Organizations in Alberta

44. An Ordinance Respecting Mechanics and Literary Institutes, N.W.T.O. 1890, No. 17; An Ordinance

Respecting Benevolent and Other Societies, N.W.T.O. 1891-2, No. 19. These two ordinances were basically the same as Ontario's statutes of that time. Benevolent and Provident Societies Act, R.S.O. 1887, c. 172; Mechanics and Literary Institutes Act, R.S.O. 1887, c.173.

45. The Alberta Act (Can), 4 - 5 Ed. VII, c.3, s.16.

46. Mechanics and Literary Institutes Act, S.A. 1908, c.16; Benevolent Societies Act, S.A. 1922, c.159.

47. Societies Act, S.A. 1924, c.11, s.40.

48. S.A. 1915, c.7, s.2(16) "Friendly Society" shall include any corporation, society, association, or fraternity, benevolent, mutual, provident, industrial, or co-operative, or the like, which does not carry on insurance for profit, and which through mutual co-operation of its members furnishes to such members or their families, relatives, or dependents, or other designated beneficiaries upon a specified contingency aid, protection, or benefit.

49. R.S.A. 1980, c.I-5, ss.1(i) and 1(0.1).

s.1(i) "fraternal society" means a society, order or association incorporated for the purpose of making with its members only and not for profit, contracts of life, accident or sickness insurance in accordance with its constitution, by-laws and rules and this Act;

s.1(0.1) "mutual benefit society" means a corporation formed for the purpose of providing sick and funeral benefits for its members, or for that and any other purposes except life insurance.

50. S.A. 1924, c.11, s.4(1).

51. S.C. 1917, c.25, s.4, amending R.S.C. 1906, c.79, s.7. "...objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like..."

52. Supra n. 46.

53. Supra n. 46.

54. Alberta Hansard was not begun until 1972.

55. S.A. 1924, c.11; R.S.A. 1942, c.245; R.S.A. 1955, c.315; S.A. 1958, c.79; R.S.A. 1970, c.347; S.A. 1977, c.59; S.A. 1980, c.47; R.S.A. 1980, c.S-18 .

56. Rebecca Cowdrey, "Legislative History of the Various Not-For-Profit Corporation Statutes in Alberta" (1981) an unpublished paper on file with the Institute of Law Research and Reform, Alberta.

57. R.S.A. 1980, c.S-18, s.3.

58. Supra n. 36 at s.4(1).

59. S.A. 1924, c.11, s.6; R.S.A. 1980, c.S-18, s.4.

60. Application to form the Edmonton Art Gallery on file with the Corporate Registry, Edmonton.

61. Application to form the Garneau/University Child Care Centre Society on file with Corporate Registry, Edmonton, Corporate Access No. 50339066.

62. S.A. 1924, c.11, s.8(1); R.S.A. 1980, c.S-18, s.7.

63. Per telephone discussions with Mr. Bert Proskiw, the present Registrar of Corporations, and Mr. Hal Thomas, Mr. Proskiw's immediate predecessor, in Edmonton, Alberta on November 10, 1987.

64. S.A. 1924, c.11, ss.17-19; R.S.A. 1980, c.S-18, ss.13-15.

65. S.A. 1924, c.11, s.23; R.S.A. 1980, c.S-18, s.17.

66. S.A. 1924, c.11, s.32; R.S.A. 1980, c.S-18, s.27.

67. S.A. 1924, c.11, s.8(1).

68. R.S.A. 1980, c.S-18, s.4.2 and Regulation 203/84.

69. S.A. 1924, c.11, s.33; R.S.A. 1980, c.S-18, s.28.

70. R.S.A. 1980, c.S-28, s.31.

71. 1856(U.K.) 19 & 20 Vict., c.47, s.xxxvii.

72. 1862(U.K.) 25 & 26 Vict., c.89, s.21.

73. Id. at s.9.

74. Supra n. 33 at 48.

75. S.A. 1913, c.20.

76. N.W.T.O. 1901, c.20.

77. S.A. 1913, c.20, s.2.

78. _Id._ at s.4.

79. R.S.A. 1980, c.C-20, Part 9, ss.200-202.1.

80. Tony Cashman, _Edmonton Exhibition The First Hundred Years_ (1979) gives a detailed account of the participation of agricultural societies in the settlement and development of Alberta.

81. _Id._ at 9.

82. _Id._ at 6 and 14.

83. S.A. 1903(1), c.22.

84. R.S.A. 1980, c.A-12, s.2.

85. R.S.A. 1980, c.R-14.

86. _Id._ at s.2.

87. _Id._ at s.11.

88. Immanuel Lutheran Church of Tomahawk, Alberta, Corporate Registry, Department of Consumer and Corporate Affairs, Edmonton, Alberta.

89. A. Montgomery and M.M.S. Rogers, _A Brief History of Alberta's Women's Institutes_ (1937) 4.

90. _Id_. This brief quote was excerpted from a circular prepared by the Superintendent of Fairs and Institutes for the Department of Agriculture, December 1, 1912.

91. S.A.M. Bosetti, _The Rural Women's University: Women's Institutes in Alberta From 1909 to 1940_, Master's Thesis, Faculty of Education, University of Alberta, 1983 at 1.

92. _Id_.

93. S.A. 1916, c.21.

94. _Scrapbook Hansard_, Edmonton Journal, February 26, 1916.

95. _Scrapbook Hansard_, Edmonton Bulletin, March 10, 1922.

96. _Id_. and Bill 45, 1922.

97. Scrapbook Hansard, Edmonton Bulletin, March 11, 1922.

98. Id.

99. Scrapbook Hansard, Edmonton Bulletin, March 18, 1922.

100. R.S.A. 1980, c.W-13.

101. C.O. 1898, c.68.

102. R.S.A. 1922, c.166.

103. S.A. 1960, c.12, s.46.

104. R.S.A. 1980, c.C-3, s.2(1).

105. Corporate Access Number Cem.232, Corporate Registry, Department of Consumer and Corporate Affairs, Edmonton, Alberta.

106. S.A. 1913(1), c.12.

107. Scrapbook Hansard, Edmonton Journal, March 11, 1913.

108. S.A. 1966, c.120.

109. R.S.A. 1955, c.81.

110. Northern Clubs Act, S.A. 1907, c.42 and S.A. 1911-12, c.79.

111. S.A. 1907, c.23.

112. S.A. 1966, c.120, s.3(i).

113. Id. at s.4.

114. S.A. 1907, c.23. At this time the existing societies legislation consisted of an Ordinance Respecting Benevolent and Other Societies and an Ordinance Respecting Mechanics' and Literary Institutes. Supra n. 44.

3. Inconsistency and Overlap Between Alberta's Nonprofit Statutes

115. Societies Act, R.S.A. 1980, c.S-18; Companies Act, R.S.A. 1980, c.C-20; Cemetery Companies Act, R.S.A. 1980, c.C-3; Agricultural Societies Act, R.S.A. 1980, c.A-12; Women's Institute Act, R.S.A. 1980, c.W-13; Religious Societies' Land Act, R.S.A. 1980, c.R-14; Co-

operative Associations Act, R.S.A. 1980, c.C-24; and private act incorporations.

116. Institute of Law Research and Reform, Proposals for a New Alberta Incorporated Associations Act, Report No. 49 (1987) 15.

117. Institute of Law Research and Reform, "Non-Profit Corporation Act - Tentative Proposals and Discussion Paper", unpublished and undated, at 3. Companies incorporated under the Religious Societies' Land Act, the Cemetery Companies Act, and private acts, are not presently required to file annual or other reports or notices with the Registrar or any other government agency.

118. Societies Act, R.S.A. 1980, c.S-18, s.1(b); Companies Act, R.S.A. 1980, c.C-20, s.1; Cemetery Companies Act, R.S.A. 1980, c.C-3, s.1(b); Religious Societies' Land Act, R.S.A. 1980, c.R-14, s.1(c).

119. Agricultural Societies Act, R.S.A. 1980, c.A-12, s.1(b).

120. Women's Institutes Act, R.S.A. 1980, c.W-13, s.6.

121. R.S.A. 1980, c.R-14, s.2(1).

122. R.S.A. 1980, c.C-3, s.6.

123. R.S.A. 1980, c.R-14, s.2(3).

124. R.S.A. 1980, c.C-3, s.s.11 and 14(1).

125. R.S.A. 1980, c.R-14, s.s.11 and 14(1).

126. R.S.A. 1980, c.S-18, s.3(1).

127. R.S.A. 1980, c.C-20, s.200(1). This section has been interpreted as placing a limitation on the purposes for which nonprofit companies may be incorporated. See Baz Edmeades, "Formulating a Strategy for the Reform of Nonprofit Corporation Law - An Alberta Perspective", [1984] XXII No. 3 Alberta L. Rev. 417 at 423. It is submitted that this interpretation of the section is inconsistent with the wording of the section. Corporate Registry of the Department of Consumer and Corporate Affairs administers the section on the basis that it does not place limits on the purposes for which nonprofit companies may become incorporated.

128. Supra n. 116 at 33.

129. Id.

130. For a more complete discussion see Chapter III, Part 2.

131. R.S.A. 1980, c.S-18, s.7.

132. R.S.A. 1980, c.C-3, s.2(4).

133. R.S.A. 1980, c.A-12, s.3(5).

134. R.S.A. 1980, c.W-13, s.9.

135. R.S.A. 1980, c.C-20, s.15. The Registrar can refuse incorporation entirely in the case of social clubs unless evidence of proper club activity for the year immediately preceding the application for incorporation is provided. s.15(3).

136. R.S.A. 1980, c.R-14, ss.11 & 12.

137. Supra n. 116 at 40.

4. The Categorization of Nonprofit Organizations

138. Henry B. Hansmann, "The Role of Nonprofit Enterprise" (1980) 89 Yale L.J. 835 at 840.

139. Id.

140. Id. at 840-41.

141. Id. at 841.

142. Id.

143. Id.

144. Bill C-10, (1974), s.1.02(6).

145. R.S.S. 1979, c.N-4.1, s.2.

146. Law 1969, c.1066, as am.

147. Alaska Stat. 10.20 (1985 & Supp. 1987).

148. 24 Calif. Corp. Code 5002-10083 West Supp. 1 1980.

149. Peter A. Cumming, "Corporate Law Reform and Canadian Not-For-Profit Corporations" (1974) 1 The Philanthropist 10 at 19.

150. Id. at 18.

151. [1891] A.C. 531 at 583.

CHAPTER III - THE CORPORATE NATURE OF NONPROFIT ORGANIZATIONS

Notwithstanding the diversity of corporate statuses which are found among nonprofit organizations, there are certain issues which are relevant to most, if not all nonprofit organizations. The following discussion will examine the corporate issues most pertinent to the structure and function of nonprofit organizations, including the distribution constraint, the right to incorporate, limitations on purposes, the duties and responsibilities of directors and officers, and the rights of members.

1. Distribution Constraint

The distribution constraint is the most essential characteristic of a nonprofit organization. It is the prohibition against the distribution of profits or any other income to anyone who exercises control over a nonprofit organization.[1] This, of course, is the antithesis of a business corporation which exists entirely for the purpose of making a profit which can be distributed to its shareholders. The most telling example of this basic difference between nonprofit and business organizations is found in a 1919 case in which the shareholders of the Ford Motor Company alleged that the company's president, Henry Ford I, was operating the company as a "semi-eleemosynary institution and not as a business institution."[2] The dividends the shareholders had been receiving amounted to slightly more than 1% of their proportionate share of the net worth of the Corporation.[3] The rest of the profits were being put back into the business, it being the ambition of its founder "...to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[4] The court agreed "that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company..."[5] The court held that the primary goal of a business corporation is to earn a profit for its shareholders, and that while different means may be chosen to reach that end, the end must remain the same.[6]

The essential difference, therefore, is the distribution of profit, as opposed to the earning of profit. None of the statutes governing nonprofit organizations prohibit them from earning a profit, rather they limit what may be done with [illegible] profit. For example, Part 9 of Alberta's Companies Act requires associations wishing to incorporate to prove to the Registrar "...that it is the intention of the association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association,..."[7] It is clear from this section that while profits are acceptable, the use of them for purposes other than the pursuit of the company's objects is not acceptable. However, this does not prohibit the payment of necessary and legitimate expenses incurred in the pursuit of those objects.[8] For example, a nonprofit organization can pay salaries, as long as those salaries are not excessive or substantially above market;[9] and a nonprofit organization can pay for the capital it requires, as long as it remains in the area of debt financing as opposed to equity financing.[10]

Some of the nonprofit statutes prohibit the distribution of "property" or "assets" rather than simply "profits" or "income". For example, Alberta's Societies Act provides that "No society shall...distribute its property among its members...",[11] while Part II of the federal Corporations Act uses the phrase "without pecuniary gain to its members,"[12] and Alberta's Agricultural Societies Act refers to the "funds of a society".[13] In short, the distribution constraint prohibits the distribution of all corporate assets.[14]

A prohibition which forbids the distribution of assets to "members"[15] is not completely accurate in that it fails to communicate that distribution is prohibited to anyone who exercises control over the organization.[16] This includes officers and directors, as well as members. It also includes individuals who make financial contributions to the organization. The use of the term "members" probably occurs because members are the nonprofit version of shareholders, the latter being the primary recipients of distributions made by a business corporation. However, "members" is widely used in nonprofit legislation in the context of the distribution constraint, and it is submitted that it adequately conveys the message that none of the participants in any nonprofit organizations are to receive the benefits that owners, investors and shareholders receive in business organizations.[17]

The distribution constraint is comprised of a current or operating constraint and a terminal constraint.[18] A current distribution constraint prohibits the distribution of profits, dividends, property or assets of any kind to the members, officers and directors of a nonprofit organization while it is operating, but does not prohibit such a distribution upon the dissolution of the organization. A terminal distribution constraint prohibits the distribution of profits, dividends, property and assets upon the dissolution of a nonprofit organization. Some of the nonprofit statutes in Alberta contain only a current distribution constraint. For example, the Societies Act quite clearly prohibits a declaration of dividends or distribution of property "...during the existence of the society."[19] The Act is not so clear with respect to the disposition of assets upon dissolution, providing only that "The liquidator or liquidators...may...[distribute] the proceeds amongst the persons by law entitled to them".[20] Similarly, nonprofit companies incorporated under the Companies Act are prohibited from paying dividends to the members of the association,[21] but are not limited in the distribution of assets upon dissolution. The Cemetery Companies Act prohibits the payment of dividends or profits, but does permit the payment by the company of interest at a maximum rate of 8% on shareholders' "...paid-up stock not represented by land in the cemetery."[22] This in effect treats the shareholders' payment for shares as a loan to the company to be used for the purchase of land for a cemetery. As further evidence of this the Act also allows the company to "...repay to...shareholders the amount of paid-up stock held by them and not represented by land in the cemetery."[23] The Cemetery Companies Act therefore has a current distribution constraint which allows for certain limited returns to the shareholders in the nature of interest and refunds.

Some of the nonprofit statutes in Alberta contain only a terminal distribution constraint. The Religious Societies' Land Act provides that upon the winding up of an incorporated congregation the liquidator "...shall...distribute the surplus to one or more religious or charitable organizations..." which have been chosen by the members of the congregation.[24] It further provides that if no organizations have been chosen, the Court may make an order governing the disposition of the surplus, including an order that it be vested in the ultimate heir under the Ultimate Heir Act.[25] The Agricultural Societies Act also contains a terminal distribution constraint.[26] Upon dissolution of an agricultural society the liquidator must call a meeting of the members of the society who may decide to give some or all of the surplus "...to an association or body engaged in community service in the locality in which the society operated."[27] Any remaining surplus must be paid into the General Revenue Fund, if it is a money surplus, or to the Crown, if it is not a money surplus.[28]

If passed, Bill 54, the proposed Volunteer Incorporations Act, will provide a choice to incorporated associations. They will be required to include in their articles of association a provision with either a current distribution constraint, or a provision with both a current and a terminal distribution constraint.[29]

The decision as to which type of distribution constraint is more appropriate depends on the type of nonprofit organization. For those nonprofits which are set up by the members for the benefit of the members, a current distribution constraint is more appropriate than a terminal distribution constraint or a combination of both. In these types of membership or mutual benefit organizations "...the membership is voluntary, the impact on the community is slight, and the monies involved [are] relatively insignificant so that the members can be left for the most part to work out their own problems."[30] In short, little regulatory control is required, even with respect to the distribution of assets, since the public interest is not at risk. For example, consider ten neighbours who form a club to learn about garage construction and to help each other build their own garages. Each neighbour contributes a specified sum of money to pay an instructor and to purchase tools, hardware and lumber. Once all the garages have been built the club is wound up and the tools and remaining hardware and lumber are sold. There seems to be no compelling reason to prohibit the return of these proceeds to the club members or to force them to find a club with similar purposes to which the proceeds can be donated. The members are not making a profit in this way - they are simply being refunded that portion of their contribution which was not used to achieve the club's purposes. Therefore in the absence of a statutorily imposed terminal distribution constraint there is no compelling reason to restrict the distribution of assets to members upon dissolution.[31]

It has even been suggested that a current distribution constraint is unnecessary in certain circumstances for mutual benefit or membership nonprofit organizations.[32] Consider the garage construction club above. What if one of the neighbours was transferred to another city before his garage was built? Should the neighbour be reimbursed under these circumstances? If the club was formed in California the answer would be "yes". The California Nonprofit Corporations Act allows this type of current distribution if the membership is terminated.[33] In Alberta, however, the situation is not as clear. If the club was formed under the Societies Act, it is doubtful whether he could recover his initial contribution since that Act prohibits the distribution of property during the existence of the society.[34] However, if the club was formed under the Companies Act and the contribution was made by way of a purchase of shares, he could probably be reimbursed since the Companies Act allows the company to buy back issued shares.[35]

A terminal distribution constraint or a combination of a current and a terminal distribution constraint is more appropriate for nonprofit organizations which are established for the benefit of the public and which operate with funds and resources donated for the most part from outside the membership. These are commonly referred to as public benefit or charitable organizations.[36] As compared with mutual benefit or membership nonprofit organizations, the public has greater involvement and more at stake generally. Therefore more regulatory control is necessary, particularly with respect to the proper management of the assets during the existence of the organization and upon its dissolution. Neither those who control charitable or public benefit nonprofit organizations nor those who finance them should profit from their association with them. The circumstances which justify a distribution of assets to members of mutual benefit or membership nonprofit organizations do not arise with public benefit or charitable nonprofit organizations where public funds are donated for use for the public good. For example, an organization which is established to provide housing, nursing care, and education to multi-sensory handicapped children and which operates with funds from the various levels of government, the United Way, and fund raising campaigns, cannot divide up the surplus and distribute it to its staff and members upon dissolution. The money was donated to be used for the benefit of the public, not for the benefit of staff and members.

Unfortunately, however, the law is not entirely clear on this matter, notwithstanding the apparent logic of this point. In the absence of a statutorily imposed terminal distribution constraint, it seems that there are three possibilities with respect to the distribution of surplus assets of a charitable or public benefit nonprofit organization upon dissolution.[37] First, they could be returned to the donor if it is found that there was an implied condition that they were not received from a donor with a general intention to be used for a charitable purpose.[38] Second, they could be vested in the Crown on the principle of bona vacantia.[39] And third, the cy pres doctrine could apply whereby the intention of the donor would be given effect as nearly as possible if he had a general charitable intent.[40]

Because of the obvious difficulties which can arise both during the existence of and upon the dissolution of nonprofit organizations, a statutory solution is desirable and necessary. Notwithstanding the fact that prohibition against distribution of assets is the essential characteristic of nonprofit organizations, specific provisions are necessary to ensure that the distribution constraints are implemented and administered appropriately for all nonprofit organizations in all circumstances.

2. The Right to Incorporate

Incorporation was originally one of the prerogatives of the Crown.[41] It has evolved from being a privilege to a right in the context of business corporations, but has not yet totally accomplished this transition in the context of nonprofit organizations.

With the exception of the merchant gilds, the early English gilds were not incorporated entities. Only when it became necessary in order to secure a monopoly of a commodity or branch of trade did the merchant gilds obtain Royal Charters,[42] these being at the discretion of the Crown. Without such a charter, a merchant gild wishing to participate in foreign trade, for example, would not be permitted to do so.

Friendly societies were also not incorporated in England during the initial years of their development. They operated totally independently with their own funds and under their own rules. Even when a voluntary system of registration was implemented, many chose not to register, or if they did, continued to operate independently of the regulations which governed them.[43] However, for those societies who chose registration in order to obtain the benefits of registration,[44] registration was not automatic. Under the friendly societies statutes the Registrar had the authority to approve or disapprove of a friendly society's rules,[45] and to decide which types of friendly societies could be registered and for what purposes.

In Alberta the first societies were formed under two ordinances of the Northwest Territories,[47] neither of which granted a discretion to registration officials to refuse incorporation. Incorporation was granted once the incorporation procedures had been complied with. However, when the Province of Alberta incorporated its own Societies Act in 1924, the Registrar was given an "uncontrolled discretion [to] refuse incorporation for any reason which appear[ed] to him to be sufficient."[48] This provision is also included in the present Societies Act.[49]

Incorporation as of right was originally not a fact for companies either. It was not until the 1844 Joint Stock Companies Act that incorporation as of right was introduced, and then only for commercial and business companies.[50] Incorporation as of right began to apply to nonprofit companies when provisions were made for them within the various companies acts in which incorporation was already a right for business companies. For example, incorporation is a right under Alberta's Companies Act.[51] Therefore, nonprofit companies wishing to incorporate under this Act are also entitled to this right.

As far as Alberta's other nonprofit statutes are concerned, there is some inconsistency between them with respect to the issue as to whether incorporation is a right or a privilege. The discussion in the preceding chapter indicated that while some statutes vest the Registrar of Corporations with the right to refuse incorporation for any reason, others compel him to grant incorporation once the incorporating requirements have been met.

Bill 54, the proposed Volunteer Incorporations Act, will make incorporation a right for incorporated associations in Alberta.[52] This will mean that all new incorporations under the new Act, all existing societies and nonprofit companies which register under the new Act, and all extra-provincial nonprofit corporations that continue under the new Act, will be incorporated or will be deemed to be incorporated by providing the Registrar with the incorporating documents required by the new Act.[53] The drafters of Bill 54 cited several reasons for this step. It was their opinion:

> ...that the law should allow people to incorporate without having to obtain the approval of an official,... [that] incorporation does not signify any social or governmental approval of the incorporated entity,... [that] a corporation is as much subject to the law of the land as are its members, so, incorporation would not enable an incorporated association to further an illegal purpose.[54]

While these points may be convincing and may give cause to wonder why incorporation was ever discretionary, there were seemingly valid reasons for the view that incorporation should be regarded as a privilege and not as a right. A discretionary grant of incorporation provided "an opportunity to control the character and quality of incorporations and...thereby protect the public interest."[55] This was viewed as especially important with respect to nonprofit organizations because of their often charitable purposes, activities, and financial arrangements.[56] Discretionary incorporation might also create the appearance of government sanction for a particular nonprofit undertaking for which public funds were being solicited.[57] In some American jurisdictions discretionary incorporation is used to protect the public from superfluous and illegal nonprofit corporations. For example, certain types of nonprofit corporations in the state of New York[58] require the approval of a justice of the Supreme Court, and in certain circumstances other state officials, in order to ensure that the corporation is needed and that it does not violate any law or public policy.[59]

Nevertheless, leading Canadian and American theorists believe that control of the character and quality of nonprofit corporations can best be achieved by monitoring the actual results or activities of the incorporation.[60] In addition to promoting quality and good character, controls at this stage might also serve to discourage incorporation by those with illegal motives, by providing sanctions and penalties sufficient to deter those with all but the most honest intentions.[61] As to the argument regarding perceived government sanction, it has been said that in practice donors respond to solicitation on the basis of the tax deductibility of their gift, not on the basis of credibility by virtue of perceived government sanction.[62]

Other reasons given for rejecting the notion that discretionary incorporation is necessary in order to protect the public interest relate to the practical and administrative aspects of incorporating. First, if incorporation is refused under one statute, a group can simply incorporate under a statute which does not provide for discretionary incorporation. For example, if a group's application is refused under Alberta's Societies Act, it could simply apply for incorporation under the Companies Act where incorporation is granted once the procedural requirements for incorporation have been complied with.[63] Another practical consideration is the time and cost of administering a discretionary incorporation procedure in which a determination must be made with respect to each application.[64] Making incorporation a right would eliminate most of this cost, leaving administrators the simple task of ensuring that the appropriate incorporating documents had been provided. A third practical consideration is the potential thwarting of beneficial nonprofit activity, whereby otherwise useful pursuits are hindered or discouraged by the exercise of statutory discretion.[65] Moreover, groups whose applications have been refused may simply choose to carry on their activities as unincorporated associations. As such they have no legal status for purposes of entering contracts and participating in litigation. In terms of the protection of the public interest it would be more beneficial to allow such groups to incorporate and become separate legal entities accessible to litigation and capable of entering contracts.[66]

It would therefore appear that it is not necessary to control the incorporation of nonprofit organizations by providing for discretionary incorporation. The main concern is for the protection of the public interest which can be adequately accomplished with mechanisms to control the actual activities of the incorporated entity, rather than its proposed activities.

3. Limitations on Purposes

While modern corporate law has left the limitation of corporate purposes behind, the incorporated nonprofit organization must still confine its activities to statute approved purposes or to the self-determined purposes in its corporate constitution. This was not always the case. The early English gilds were formed as need dictated.[67] Their purposes were determined only by the needs which necessitated their establishment, since there were no laws or rules which governed their creation. When friendly societies assumed the functions of the gilds, the concept of permissable purposes gradually came to be included in the legislation which was developing to regulate them.[68] The categories of purposes were essentially a codification of those which had evolved as need had dictated. In order words, it is submitted that the enumerated categories of purposes were a listing of that which did exist rather than a conscious determination of that which should exist.[69]

The first statutes in Alberta governing societies consisted of two Northwest Territories Ordinances, both of which placed limits on the purposes for which societies could become incorporated.[70] Similarly, the 1924 Societies Act, which repealed and replaced these two ordinances, contained a provision setting out the permissable purposes for which societies could become incorporated,[71] a section which is still included in the present Societies Act.[72]

While the Societies Act and certain other of Alberta's nonprofit statutes limit the purposes for which incorporation is permitted, there are no similar limits placed on the incorporation of nonprofit companies incorporated under Alberta's Companies Act.[73] This inconsistency in approach was one of the issues addressed by the Institute of Law

Research and Reform in the preparation of what is now Bill 54, the proposed Volunteer Incorporations Act. Among its recommendations for reform was a recommendation "that the proposed statute not place any restriction upon the purposes for which associations may be incorporated under it."[74] The Institute was of the opinion that "the principle that anyone can incorporate for any purpose is already conceded: it is embodied in the Business Corporations Act."[75] Other reasons for its recommendation included the undesirable prospect of nonprofit organizations without statute-sanctioned purposes incorporating under the Business Corporations Act,[76] an inappropriate statute for nonprofit organizations; the fact that incorporation does not signify governmental approval of a corporation's purposes, so the perception of this due to the inclusion of statute-permitted purposes should not continue; and finally, that the pursuit of an illegal purpose is no more nor less possible with or without a list of permissable purposes, since the law of the land applies in either case.[77]

There are two basic approaches to permitted purposes for nonprofit organizations - the functional approach and the economic approach.[78] The functional approach views the activities in which the organization is engaged as the determining factor, while the economic approach views the economic relationship between the organization and its members as the determining factor.[79] Legislation utilizing the functional approach lists the purposes for which the incorporation of a nonprofit organization is permitted. The purposes usually fall within nine general categories: benevolent and charitable or philanthropic, social, recreational, trade and professional, educational, cultural, civic, religious, and scientific.[80] Legislation utilizing the economic approach permits incorporation for any lawful purpose as long as there is no economic gain or profit to the members of the nonprofit organization.

The debate as to which is the more appropriate approach has been going on for some time. Hansmann in his discussions about the reform of nonprofit corporation law laments that "It is difficult to find a coherently stated rationale for the limitations contained in the older statutes, or conversely to find a clear statement of the reasons for the recent trend toward their elimination."[81] An examination of the two approaches reveals problems with each.

3(a) The Economic Approach

The economic approach, which is the approach currently favoured by legal theorists,[82] suffers from certain ambiguities with respect to the terms used in defining it. For example, the phrase "without pecuniary gain", which is used in section 145(1) under Part II of the Canada Corporations Act,[83] could be interpreted to mean three different things.[84] First, it could mean that members are to receive no pecuniary benefit of any kind.[85] This would preclude the incorporation of a trade association, for example.[86] Trade associations are usually formed to promote business generally by fostering the goodwill of the public toward business, and to advance the economic interests of the member businesses by providing information, lobbying governments, and promoting technical research. The members benefit by these activities and thereby gain some pecuniary advantage in the long term. However such advantage is indirect and is, if not intangible, difficult to ascertain or to quantify. To therefore interpret "pecuniary gain" so as to exclude organizations whose members receive such indirect and unquantifiable benefits would, it is submitted, place unrealistic limitations on the activities of all nonprofit organizations.

Second, "without pecuniary gain" could mean that there is to be no indirect pecuniary gain to the members.[87] This would preclude the incorporation of a cooperative association, for example.[88] Co-operative associations provide benefits to members by providing them with goods and services at reduced prices. This saving of expense could be construed as an indirect pecuniary benefit, thereby precluding co-operative associations from incorporating under this interpretation of the phrase "without pecuniary gain." In fact, co-operative associations are not incorporated under Part II of the Canada Corporations Act, but are incorporated federally under the Canada Cooperative Associations Act,[89] and provincially in Alberta under the Co-operative Associations Act.[90]

The third possible interpretation of the phrase "without pecuniary gain" is the narrowest interpretation, and apparently the one used by the administrators of Part II of the Canada Corporations Act.[91] Under this interpretation the phrase could mean that there is to be no direct pecuniary gain to the members. This would preclude the incorporation of organizations which distribute profit to members by way of dividends on shares or by some other form of direct return on investment. It is submitted that this interpretation is the most appropriate interpretation since it avoids the ambiguities of the first two interpretations and thus more closely delineates the limits of nonprofit activities.

Statutes which adopt the economic approach permit the incorporation of a nonprofit organization for any lawful purpose other than the acquisition of gain. Given the possible interpretation of the phrase "without pecuniary gain" or other similar phrases, the interpretation of the phrase "for any lawful purpose" must also necessarily be limited. If it were not limited it would be open to nonprofit organizations to operate for the purpose of providing profit to its members. This of course is contrary to the essential nature of nonprofit activity. However, the inherent limitation on the distribution of profits to members does not preclude a nonprofit organization from earning profits, as long as those profits are incidental to its fundamental purpose and are not distributed to its members.[92]

Where the economic approach is adopted it appears that the rights of two groups may be adversely affected-creditors, and the government by virtue of its interest in tax revenues.[93] However, it also appears that any adverse consequences would be insignificant to either group - to creditors because by comparison, the creditor safeguard afforded by the small amount of capitalization required for business incorporation is not significantly greater than that in the context of nonprofit incorporation; and to government because tax exemption does not automatically follow nonprofit incorporation.[94]

3(b) The Functional Approach

The functional approach to permitted purposes for nonprofit organizations also presents definitional problems in its application. Hansmann points out that while it may be a relatively easy task to determine what activity is included on any given list of permitted purposes, the task becomes more difficult when a determination has to be made with respect to what is not included on such a list.[95] For example, it seems fairly obvious that a daycare, an art gallery, or a space museum could incorporate under a statute which listed the nine basic categories of permissable purposes.[96] However, it is not so clear whether a cafeteria or a souvenir shop within the daycare, art gallery, or space museum, could operate under such a statute, notwithstanding the application of its profits to the purposes of the daycare, gallery or museum. Hansmann remarks that it is commercial nonprofits such as these which are hardest to fit within the language of the more restrictive statutes.[97] In Alberta, for example, the problem is more acute because the Societies Act not only provides a list of permissable purposes, it also provides further limits by adding a prohibition against "carrying on a trade or business." As a consequence, a cafeteria or souvenir shop which might not have been permitted to operate under a statute with a list of permissable purposes, would almost certainly not be permitted to operate under a statute with a business prohibition as well as the list of permissable purposes.

In addition to there being a concern that certain activities could be improperly excluded because of ambiguities with respect to the listed purposes, it is also conceivable that certain useful activities could be excluded because the list of purposes omitted certain purposes. For example, some statutes include education as a permitted purpose, while others do not; some include agriculture, while others do not; and some include trades and professions, while others do not.[99] This may not be too significant within Alberta, given first that the list in the Societies Act includes all but one of the nine basic categories of permissable purposes, and second that Alberta has other nonprofit statutes under which nonprofit organizations can choose to become incorporated. However, there may be some problems when a nonprofit organization incorporated in one jurisdiction may not qualify for incorporation in another jurisdiction in which it desires to operate.

The functional approach has also been criticized because of the possibility that as social values change, certain permissable purposes may become outmoded.[100] This is a more significant concern where the listed purposes are narrow and specific, unlike the broad categories of purposes which are listed in, for example, Part II of the Canada Corporations Act or Alberta's Societies Act.[101]

Another area of concern regarding the functional approach is the method by which organizations are approved for incorporation. In some American jurisdictions judicial approval is a prerequisite to the incorporation of a nonprofit organization.[102] For example, in New York approval will not be granted if there is no need for the corporation or if the proposed corporation violates any law or public policy of the state.[103] Examples of organizations in New York which have been refused incorporation include a private military organization to train young boys in "military tactics, procedures, and discipline," a function it was thought would be better left to the government;[104] a cancer research organization which the court said was unnecessary, there being others operating already;[105] and a council of orthodox rabbi's, for the same reason.[106]

Under the Societies Act in Alberta the Registrar of Corporations may "refuse incorporation for any reason that appears to him to be sufficient."[107] Although this discretion is rarely exercised,[108] the frequency of the exercise of the discretion is not the issue. Rather it is the fact that a discretion exists at all.

The American experience has shown that the exercise of judicial discretion has often led to inconsistent and unfair results, mainly because judges are given no statutory guidelines by which to assess the applications.[109] Similarly in Alberta, the Registrar of Corporation's only guidance regarding the incorporation of societies provides that "...the Registrar is the sole judge as to whether the purposes mentioned in the application for incorporation...are purposes for which the society may be incorporated under this Act."[110] It has been suggested that rather than providing further guidance in the exercise of this discretion, the "present system of requiring discretionary approval...should be abolished."[111] A more appropriate method would be to grant incorporation as of right and protect the public interest by monitoring the activities of the incorporated entity.[112]

In summary, there are several problems with the functional approach including ambiguities in the language used to define permissable purposes, inconsistencies between the various lists of permissable purposes, societal changes which could render a list of permissable purposes outdated, and problems with the process by which an application for incorporation is accepted or rejected. However, there are also some arguments which have been made to support the continued use of the functional approach.[113] First, by restricting the purposes for which a nonprofit corporation can become incorporated, the organizations which can qualify for tax-exempt status and other benefits are also restricted.[114] While seemingly logical this argument ultimately fails because it is based upon the false assumption that nonprofit incorporation means automatic tax exemption, or automatic benefits of other kinds. In the case of taxation for example, the statutes only exempt certain specified nonprofit organizations,[115] and in the case of other benefits there are factors in addition to corporate status which determine eligibility.[116] Therefore, because these benefits are not automatic, it cannot be said that unrestricted purposes mean unrestricted benefits, nor can it be said that a restriction on purposes means a restriction on benefits.

Another argument used to rationalize the use of the functional approach relates to the protection of patrons or consumers and the theory of contract failure.[117] "Contract failure" refers to the inability of consumers to compare products and prices, to reach an agreement with a chosen firm at a certain price, to determine whether what was contracted for was what was actually received, and if it was not, to obtain redress.[118] In other words, "contract failure" occurs when consumers are unable "to police procedures by ordinary contractual devices."[119] Hansmann theorizes that it is in these situations where business corporations fail and nonprofit corporations naturally succeed. It should follow that nonprofit activity be restricted to these areas - a sort of "do what you do do well" approach. Notwithstanding the apparent logic in this argument, Hansmann rejects it.[120] Allowing nonprofits to operate in traditionally for-profit spheres does not jeopardize consumers in any way, since these are the areas in which they are best able to "police" producers due to the absence of contract failure. " Further, there is no obvious reason to believe that the legislators, state officials, and judges who are responsible for establishing and administering the restrictions on nonprofit incorporation will be better qualified than the market to make judgments concerning the relative performance of nonprofit and for-profit producers in any particular activity."[121] In short, impose no restrictions on nonprofit activity and allow the market forces to prevail.

A third possible justification for the functional approach to nonprofit incorporation is what Hansmann calls "Protecting Normative Behaviour."[122] He suggests that because it is more likely that directors and managers in well-established nonprofit pursuits will adhere to their fiduciary responsibilities than will directors and managers in more recently established nonprofit activities, nonprofits should continue to be confined to the well-established activities and should be allowed to expand their sphere of activity only very gradually.[123] This justification is problematic for two reasons.[124] First, the assumption that managers and directors regard their fiduciary duties with more or less respect according to the length of time that nonprofits have been involved in a given activity is difficult to prove and hence open to some doubt. Second, even if such an assumption were true, it would be more appropriate to adopt measures which focus on the problem itself - the adherence to fiduciary responsibilities - rather than on the location of the problem.

A fourth possible rationale for the functional approach relates to the use of assets by a nonprofit organization, and in particular, to the potential for perpetual restrictions on charitable donations.[125] The perceived problem is that a nonprofit organization with substantial assets but whose organization has outlived its usefulness, will nevertheless perpetuate its existence in order to continue to employ its managers and other employees, rather than transferring its assets to a more productive and useful nonprofit organization. Therefore if nonprofit activity were allowed to proliferate without restrictions on purposes, there is the danger that too much money could become tied up in unproductive pursuits. In reality, this seems like a minor risk, and even if it were significant, the more appropriate response would be to address the actual problem as it occurs in individual cases, rather than restricting the activities of all nonprofit organizations in order to resolve the problems of only a few.[126]

In conclusion, there seems to be no justification for the continued use of the functional approach to nonprofit incorporation. The theory that less nonprofit activity means less problems, while at first glance seems logical, is inappropriate. The potential problems associated with unlimited purposes are all either too insignificant to pose a serious threat, or are easily remedied by means specific to the problems as opposed to a broad restriction on all nonprofit activity. If excessive access to tax exemption and other benefits is a significant problem, then define eligibility more clearly; if non-compliance with fiduciary duties is a significant problem, then define those duties more clearly; and if assets are being tied up in unproductive pursuits, devise a scheme to encourage the transfer of those assets to more productive pursuits. In short, the continued use of the functional approach cannot be justified when to do so in effect penalizes the entire group in an attempt to redress the problems of a few, notwithstanding good intentions.

In terms of historical evolution of nonprofit incorporation it would appear that the functional approach evolved naturally according to changing societal needs.[127]

The purposes which were originally listed in the first Friendly Societies Acts in England simply reflected or defined the various purposes which unincorporated nonprofit organizations were already pursuing. In other words, the statutory provisions were determined by existing nonprofit activity and not vice versa. Nonprofit activity continues to evolve. It therefore follows that the statutes which govern them should also. Requiring nonprofits to restrict themselves to static purposes does not permit this evolution. Nonprofit activity is a significant segment of our society, and an increasingly sophisticated segment. If this activity is accepted as necessary and worthwhile, it must be allowed to evolve unrestricted by existing limits in order to meet ever increasing demands. Further, if the need for and benefits of nonprofit activity are acknowledged, it should not matter how that activity is supported, short of illegality, especially if the potential problems are not significant or are easily remedied with measures specific to them.

4. The Duties and Responsibilities of Directors and Officers

Throughout the 1970's corporate law underwent substantial reforms, some of which involved the duties and responsibilities of directors and officers.[128] As a result, the existing common law, equitable, and statutory duties were organized and codified in the new corporate statutes which were passed both federally and provincially during this time period.[129] For example, under Alberta's Business Corporations Act directors and officers have a statutory duty to manage the corporation according to the provisions of Part 9 of the Act and the by-laws of the corporation, which taken together encompass all matters regarding the duties, responsibilities, and liabilities of directors and officers. In particular,

1) section 117(1)(a) requires directors and officers to act honestly and in good faith in the best interests of the corporation,
2) section 117(1)(b) requires directors and officers to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances,
3) section 115 requires directors and officers to disclose their interest in contracts with the corporation,
4) section 119 sets out the circumstances in which directors and officers may be indemnified and insured, and
5) sections 101 and 104 provide for the appointment, election and removal of directors.

The same cannot be said of nonprofit law. While some jurisdictions have reformed their nonprofit statutes,[130] there have not been the significant reforms such as were implemented in the business corporation statutes. Consequently, the law with respect to the duties and responsibilities of nonprofit directors and officers is based on the common law in most Canadian jurisdictions.

The six major nonprofit statutes in Alberta are not among those which have been reformed.[131] Provisions in these statutes govern the more technical matters of qualification and election of directors, term of office, meetings, record-keeping, and in some cases the disposition of property.[132] The Societies Act contains little about the duties and responsibilities of directors and officers, leaving it as a matter to be dealt with in a society's by-laws.[133] The Companies Act, however, is not as limited as are the other statutes. Because the provisions for nonprofit companies are housed in a statute designed for business companies, the provisions regarding directors and officers are more numerous. But it should be noted that these provisions were enacted before the reforms of the 1970's and do not substantially alter the common law rules.

a) Fiduciary Duties and The Duties of Care, Diligence and Skill

Directors' duties are divided into two main categories: fiduciary duties, and the duties of care, diligence and skill. Fiduciary duties are those which require directors and officers to act honestly and in good faith in the best interests of the corporation. Professor Welling discusses the difficulty in clearly defining the concept of the fiduciary relationship, and concludes that "little can be said of a general nature except that fiduciaries are expected to be high-minded and forthright."[134] In addition to their fiduciary duties, directors and officers are also required to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These duties are derived in part from a characterization of directors as trustees in certain circumstances, and as agents in other circumstances.[135] Like trustees they are fiduciaries with respect to the property and other assets they manage on behalf of the organization;[136] and like agents they have specified and limited authority and must act within the scope of that authority.[137] However, to attempt to pigeon-hole directors into either or both categories would be misleading, the better approach being to view them as distinct unto themselves as determined by statutes and cases.[138]

The cases and statutes through which the duties and responsibilities of directors and officers have evolved have largely been based on business corporations. Should the law treat directors of nonprofit organizations any differently? Peter Cumming, in his analysis of nonprofit corporate law reform at the federal level, presents two arguments in support of a higher standard of care for directors of nonprofit organizations than for their business corporation counterparts.[139] First, unlike shareholders of business corporations members of nonprofit organizations have no personal pecuniary interest in their organization and hence are satisfied with leaving the management of the organization's affairs to the board of directors. This places a greater onus on the board of directors and arguably a higher standard to compensate for the members' seeming lack of concern. The second argument for a higher standard of care for nonprofit directors relates to their characterization as trustees. Cumming argues this because "...the assets of the [nonprofit] corporation come in many cases from public solicitations, contributions, or through tax exemption, and therefore are closer to a trust res than ordinary business corporation capital."[140]

Arguments for higher standards have also been made with respect to American nonprofit organizations. Hansmann notes that the standards of conduct are for the benefit of the nonprofit organization's patrons who "are generally less able to look out for themselves than are the shareholders in a business corporation."[141] For this reason Hansmann concludes that there should be "a stronger, clearer rule of fiduciary conduct" for the directors of nonprofit organizations than for the directors of business corporations.[142] While arriving at a similar conclusion Fishman points out that there must also be a balance between society's interest in nonprofit organizations achieving their purposes and "the need to avoid undue restrictions or burdensome procedures that would make it difficult to recruit directors."[143] In other words, while high standards are necessary, they cannot be so high as to discourage potential directors from serving.

Cumming also considers this latter point. He suggests that because nonprofit directors are primarily volunteers who serve in their spare time, often in an advisory or supervisory capacity, and who serve out of a sense of "public duty" as opposed to "self-interest", a higher standard might discourage "public-spirited citizens" from accepting directorships of nonprofit organizations.[144] Cumming concludes that "...the members of the not-for-profit corporation should be able to have the confidence that the activities of the corporation are being managed by competent persons held properly accountable."[145] Cumming further concludes that there being merit in consistency in the law respecting directors' duties as between the nonprofit and business sectors, the "...same standard should govern the director of the not-for-profit corporation as that which governs the director of the business corporation."[146]

Arguments have also been made for two standards - the business corporation standard for directors of mutual benefit or membership organizations and the trustee standard for directors of public benefit or charitable organizations.[147]

The trustee standard is higher than the business corporation standard as it "requires directors to exercise the care that an ordinarily prudent person would exercise in dealing with his or her own property. This is a higher standard of care...because the trustee's duty is measured by the care exercised in dealing with his or her own property"[148] as opposed to the business corporation's directors whose duty is measured by the care exercised in "comparable circumstances."[149] Boyd has suggested that both standards are relevant for nonprofit organizations, depending on the type of organization.[150]

> Public benefit corporation directors remain virtually self-regulated, and the possibility of inattention and abuse continues to exist. To deal with this problem a trustee standard must be applied to directors of corporations in which no active body of members exists to influence the board with its votes. Applying this standard to public benefit corporations will provide greater director responsibility and diligence through potential personal liability for breaching the duties of care and loyalty.
>
> Directors of mutual benefit corporations, however, do not need to be held to such a strict standard. As long as these corporations have a membership possessing ultimate control over the board's activities, the common-law corporate standards of care and loyalty are appropriate. The members of these corporations are effectively a body of shareholders who have the power to choose and remove directors. Thus, the membership provides a safeguard against less than diligent and honest directors of mutual benefit corporations while the trustee standard protects public benefit corporations.

Boyd's recommendation for the higher trustee standard for public benefit corporations may however present difficulties for public benefit corporations in convincing potential directors to serve.

Fishman also argues for a dual standard, or as he describes it, a shifting standard of care "depending upon the nature of the supervisory or managerial function involved."[151]

> If the director's responsibility or function is ministerial or administrative, involving the "housekeeping" functions of the corporation, for purposes of the legal context, his duty of care should be treated like that of the director of the business corporation. In those matters relating to the administration of the organization, the nonprofit director should be liable only for nonmanagement, intentional mismanagement, or for the grossest negligence. Nonprofit corporation law should offer broad protection to informed, deliberate business decisions in order to stimulate rational decisionmaking and creative activities. Board decisionmaking should not be chilled.
>
> However, if a matter involves the corporation's charitable function or impacts upon its exempt purposes, a higher trust standard should apply, and the director should be liable for mere negligence. The higher standard should apply to matters of great importance to the future of the organization such as a merger, a dissolution, a change in the purposes for which the organization was formed, or a matter which is of import to the beneficiaries of the nonprofit corporation - the public. The higher standard of care should be applied in areas where the exempt purpose or the public will be affected.[152]

And while Fishman recognizes that unduly restrictive standards can discourage potential directors from serving,[153] he maintains that "if high standards of conduct are clearly articulated, they will be adhered to by most directors and thereby lessen the problem of fiduciaries abusing their power or ignoring their responsibilities. High standards widely communicated to the nonprofit sector will provide the most cost-efficient monitoring of directors' behavior."[154]

The concern that high standards will discourage potential directors is obviously of some importance to nonprofit organizations which do not have the resources necessary to pay qualified and competent directors, and which "need prominent, recognized individuals to serve on their boards...[to] attract charitable contributions and provide immediate legitimacy and recognition to the organization."[155] However, as Fishman points out the concern may be unfounded since directors of nonprofit organizations are rarely held to be liable, and when they are the penalties are not severe.[156] In addition, the availability of indemnification and insurance should also quell the fears of uneasy would-be directors. This is not to minimize the significance of the duties and responsibilities of directors, rather it is to emphasize that a balance must be achieved between "the public's right to expect that public monies or tax benefits will be used properly" and "the specter of directors' flight from boards."[157] Again, Fishman is of the view that the balance can be achieved. As he puts it, "[a]dequate standards of conduct, widely communicated to directors and officers, should be a form of insurance to directors and to the public."[158] In other words, the disincentive for potential directors is based on a lack of clarity leading to confusion and perhaps a fear of the unknown, as opposed to a fear of unlimited liability as a result of high standards, a disincentive which can be eliminated through information and communication.

It appears that the drafters of Alberta's Bill 54 are in substantial agreement with Cumming's conclusions above that the directors of nonprofit organizations should be governed by the same standard of care as directors of business corporations.[159] With respect to the directors' fiduciary duties to act honestly and in good faith with a view to the best interests of the corporation, the Institute was of the opinion that directors in a nonprofit setting should be under the same duty as those in a business corporation setting. In their words, "[a]nyone who undertakes to pursue the agreed common goals should do so honestly."[160] The Institute's draft act adopted the wording of the Business Corporations Act as does Bill 54.[161]

> Every director and officer of an incorporated association in exercising his powers and discharging his duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the incorporated association...

The Institute of Law Research and Reform also recommended that the duty on directors of business corporations to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances"[162] be applied to nonprofit directors, citing two reasons.[163] First, because of the subjective nature of the common law test of care, diligence and skill, the Institute was concerned that its application could result in the imposition of an unduly high standard on directors with special qualifications.[164] At common law the test to determine the level of skill required of a corporate director does not require him to "...exhibit in the performance of his duties a greater skill than may reasonably be expected from a person of his knowledge and experience."[165] It follows that if he is an expert in any field, he must utilize those skills in his capacity as a director. For example, the level of skill expected of a lawyer who has agreed to be a director of a corporation is determined by the training, knowledge and experience he or she has acquired as a lawyer.[166] In fact in most instances it is the lawyer's training, knowledge and experience which has earned him or her a position on a particular board of directors. It is then expected that the lawyer will utilize his or her abilities for the benefit of the corporation, for example, in drafting the organization's by-laws or constitution, or in making the board aware of areas of potential liability. In other words, the director's responsibilities should match the expectations raised by virtue of his or her particular abilities. This would apply equally in situations involving figurehead directors, that is, those directors who are primarily "window dressing"[167] and who in fact do not direct, but provide their names and reputations as an incentive for fund-raising. The application of the subjective common law test would require a lower standard of care of figurehead directors. A logical extension of these examples would place varying standards of care on nonprofit boards because of the diversity among the directors. Fishman describes the issue in the following terms.[168]

> Board members of nonprofit corporations are chosen for a variety of reasons, many of which have little to do with their responsibilities as directors. Nonprofit board members have differing skills and backgrounds. Directors are sought for special skills or achievement; support of, or relationship to, the management; social or political connections; name recognition which provides the organization with added credibility particularly useful for fund raising efforts; status as beneficiaries of the organizations's activities; or deep pockets - generous financial support. Other board members resemble their business corporate analogues in that they are knowledgeable about the particular area in which the corporation is involved. These board members transfer corporation directional skills and techniques to the nonprofit board.

In an attempt to avoid this particular problem with the subjective common law test, the Institute recommended the application of the more objective test used for business corporations in Alberta.[169]

> Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (a) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The reference to the "reasonably prudent person" removes the subjectiveness of the test by eliminating the requirement that a director exhibit a level of skill based on his own knowledge and experience. However, it is arguable that some element of subjectivity still remains by virtue of the consideration of "comparable circumstances." Professor Welling points out that "[t]he level of skill possessed by the particular manager in question is part of the circumstances."[170]

This residue of subjectivity, while perhaps undesirable in some circumstances, could be of some advantage in others. It was this possibility which formed the basis of the Institute's second reason for recommending the adoption of the duty of care, diligence, and skill in the Business Corporations Act. The Institute was of the opinion that, "in deciding what are the "comparable circumstances" which would determine the standard of care to be applied, a court would in a proper case take into consideration the volunteer nature of an incorporated association."[171] The Institute had been concerned that the duty of care, diligence, and skill imposed by the Business Corporations Act would be inappropriate given the voluntary directorships in most nonprofit organizations.[172]

b) Disclosure Requirements

In addition to applying to nonprofit directors and officers the same fiduciary duties and duties of care, diligence, and skill that apply now to directors of business corporations, Bill 54 would also impose the same disclosure requirements.[173] With the exception of directors of nonprofit companies incorporated under the Companies Act,[174] directors of nonprofit organizations in Alberta are not statutorily required to disclose their interest in any contract with the organization. In the absence of statutory disclosure requirements or disclosure requirements in an organization's by-laws, the common law will apply.

The original rule regarding a conflict of interest and duty was stated in Aberdeen Railway Co. v. Blaikie Brothers by Lord Cranworth, L.C.:[175]

> ...it is a rule of universal application that no one having [fiduciary] duties to discharge shall be allowed to enter into arrangements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

The result of a director entering into a contract in which his duty and interest were in conflict was that the contract was voidable at the instance of the corporation, and the director would be required to account for any profits realized thereby. The contract could also be ratified by the corporation.[176] But this rule has been viewed as being too strict for corporate law where in some instances the resulting contract may be of benefit to the corporation, but voided notwithstanding, while in other instances such a contract might be ratified to the detriment of the corporation. Professor Welling points out that conflicts of interest and duty are inevitable in the corporate world where directors are appointed on the basis of expertise acquired in other corporate settings with which connections are usually maintained.[177] Adherence to the rule in Aberdeen Railway Co. v. Blaikie Bros.[178] which prohibits arrangements in which there is a conflict of interest and duty is therefore unrealistic and unreasonable[179] and may discourage qualified and experienced people from serving as directors.

This was the position taken by the Institute of Law Research and Reform when it recommended that a more balanced approach to a nonprofit director's conflict of interest and duty was necessary.[180] The Institute was of the opinion that such a balance is achieved under section 115 of the Business

Corporations Act which provides that if a director discloses his interest in a contract but does not vote on it, the contract will not be voidable, nor will the director be required to account for any profits realized on the contract. This provision was accordingly included in Bill 54.[181]

c) Indemnification and Insurance

It follows that if the directors of nonprofit organizations are going to have the same duties and responsibilities as directors of business corporations, they must also be availed of the same opportunities for indemnification and insurance. Under the present nonprofit statutes there are no provisions for indemnification and insurance, although some organizations may provide for it in their by-laws.

The proposed Volunteer Incorporations Act provides for certain circumstances in which indemnification of directors and officers would be permissable and certain circumstances in which it would be mandatory. Indemnification would be permissable in "any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer."[182] Indemnification is however conditional on the director or officer having "acted honestly and in good faith with a view to the best interests of the corporation"[183] and where there is a monetary penalty the director or officer must have "had reasonable grounds for believing that his conduct was lawful."[184] Judicial approval is required before indemnification will be permitted where the incorporated association is the plaintiff and the director or officer "is made a party to the action by reason of being or having been a director or officer."[185] Indemnification is mandatory for the costs, charges and expenses of a director's or officer's defence where he was a party to an action because of his position as a director or officer if certain criteria have been met, namely: he must have been "substantially successful on the merits in his defence,"[186] he must have "acted honestly and in good faith with a view to the best interests of the incorporated association,"[187] where a monetary penalty is involved, he must have "had reasonable grounds for believing that his conduct was lawful,"[188] and finally he must be "fairly and reasonably entitled to indemnity."[189] Professor Welling notes that the requirement for only substantial success was "presumably...intended to entitle a director or officer to demand indemnity even though he has not been completely exonerated, but just how substantial a success is required remains uncertain."[190] In general, indemnification must be provided for in order to encourage capable people to serve as directors. However, it is important to balance the criteria for indemnification with the requirement that directors and officers respect and comply with their fiduciary duties and the duty of care, diligence and skill.

The Institute of Law Research and Reform also recommended that incorporated associations be allowed to obtain insurance for its directors and officers[191] "against any liability incurred by him in his capacity as a director or officer...except when the liability relates to his failure to act honestly and in good faith with a view to the best interests of the incorporated association."[192] The permitted insurance coverage is broader than the circumstances for which indemnification is provided, the "failure to act honestly and in good faith with a view to the best interests of the incorporated association" being the only circumstance in which insurance coverage would not be permitted.[193]

d) Appointment and Removal of Directors

The appointment and removal of directors are procedures which help to ensure that an organization's directors and officers are fulfilling their responsibilities properly. By providing qualification requirements an organization can have some assurance that its directors will have an appreciation of the extent of their duties and responsibilities, and will therefore be prepared to manage properly the affairs of the organization. For example, section 100 of Alberta's Business

Corporations Act, in addition to setting age, mental soundness, financial soundness, and residency requirements, requires that potential directors either consent in writing to serve as directors, or consent in person at the time of their appointment or election to a board of directors. None of Alberta's statutes regulating nonprofit organizations contain a similar provision, nor does Bill 54, although directors' qualifications may be provided for in an organization's by-laws. However, it is submitted that the inclusion of such a provision would be a simple, yet effective method of ensuring that potential directors have a more complete understanding of and appreciation for their duties and responsibilities as directors of nonprofit organizations.

Directors can only be removed if a method of removal is specified in the statute or the corporate constitution.[194] For example, section 104(1) of Alberta's Business Corporations Act provides that "the shareholders of a corporation may by ordinary resolution at a special meeting remove any director or directors from office," and paragraph 61 of Table A under the Companies Act provides five specific instances in which a director will be disqualified. The inclusion of removal provisions in the by-laws of an organization gives the organization both the option of including or not including such provisions, as well as the flexibility of determining the circumstances under which a director can be removed. While the advantage of flexibility is desirable, it is submitted that it can still be maintained if a general removal provision, such as section 104(1) of Alberta's Business Corporations Act, is included in the governing statute. In this way there is an available, sufficient and effective method of ensuring that an organization's board of directors continues to fulfill its duties and responsibilities.

Bill 54, the proposed Volunteer Incorporations Act, does not have a statutory method of removing directors, but instead provides that the "by-laws may provide for the...removal of directors."[195] It is submitted that this does not provide a sufficient safeguard for monitoring the activities of directors, primarily because it is optional. By providing a statutory method for removing directors, all nonprofit organizations will benefit, notwithstanding the content of their by-laws on the matter.

e) Conclusion

Because the directors and officers of nonprofit organizations play such a key role in decision-making and management, it is imperative that their duties and responsibilities be clearly stated and of a standard which recognizes the significance of their role. The model which is embodied in Alberta's Business Corporations Act provides a useful example. As noted above, Part 9 of the Business Corporations Act sets out fiduciary duties, the duty of care, diligence and skill, disclosure requirements, provisions for indemnification and insurance, and procedures for the appointment and removal of directors. Parts 9 and 10 of Bill 54, the proposed Volunteer Incorporations Act, include some of the same provisions, which, if passed, will be a substantial improvement over the present void in Alberta's nonprofit statutes in the area of directors' duties. In particular, the inclusion of a statutory standard of care will provide directors and officers with a clearer understanding of the expectations of their service. The standard proposed can be described as primarily objective with a residue of subjectivity. It is submitted that such a standard provides a necessary balance which is high enough to ensure that the interests of the organization will be safeguarded, but not so high as to discourage qualified and capable directors from serving. The element of subjectivity which survives in the phrase "comparable circumstances" is especially significant in that it will afford the courts a discretion to consider the voluntariness of most nonprofit directorships.

The inclusion of disclosure requirements, indemnification procedures, and the availability of insurance for directors, will also improve the situation with respect to nonprofit directors, both from the perspective of the organization and from that of the directors. The disclosure requirements will help to ensure that directors will comply with their fiduciary duties, and the availability of indemnification and insurance will help to encourage directors to serve without fear of personal liability.

The area in which Bill 54 is deficient is, it is submitted, in the context of the appointment and removal of directors. Both procedures can provide added safeguards to ensure the competence of nonprofit directors by making them aware of their responsibilities upon agreeing to serve, and by removing them if they fail to live up to those responsibilities. The provisions in the Business Corporations Act provide an effective method in both these instances and should, it is submitted, be included in Bill 54.

If the present Bill 54 is amended in this way it will put nonprofit organizations on a par with modern business corporations with respect to the duties and responsibilities of directors and officers. At the very least it will provide a known framework within which the directors and officers of nonprofit organizations can operate.

5. The Rights of Members

The rights of members of nonprofit organizations is a subject about which there has been limited comment and litigation in Canada. This is because nonprofit organizations do not generally have the resources necessary to litigate, nor is there usually a quantifiable investment to protect. Litigation which does occur is primarily personal as opposed to commercial. The references which do exist regarding the rights of members of nonprofit organizations include Canadian case reports regarding the admission and expulsion of members, American commentary with respect to the remedies available to aggrieved members, and British references on the rights of members of unincorporated associations. In addition, the Institute of Law Research and Reform has made recommendations regarding remedies for dissatisfied members, based on Alberta's experience with the shareholder remedies in the Business Corporations Act. In making its recommendations the Institute was of the opinion that the existence, or lack thereof, of share capital was a significant distinction, and one which should determine the applicability of the various shareholder remedies available in business corporation law. It is arguable that this particular distinction is insignificant and unnecessary, and that the similarities which do exist between nonprofit organizations are sufficient to support the application of shareholder remedies to all nonprofit organizations, regardless of the existence of share capital.

The following discussion considers the admission and termination of members, the rights of members to control management, and the remedies available to dissatisfied members. Because of the limited resources pertaining specifically to nonprofit organizations, this discussion was developed by extrapolating from references and authorities on business corporation law and the law of unincorporated associations. This was determined to be the most appropriate approach because of the similarities in structure, procedure, and function between business and nonprofit corporate organizations, and between incorporated and unincorporated nonprofit associations. Incorporated business and nonprofit organizations are similar because they are formed under and governed by statutes which provide for structure, function and process. Incorporated and unincorporated nonprofit organizations are similar because they both evolved as purpose-oriented associations. The rights of members of incorporated organizations are based on the statute under which the organization is formed, the constitution and by-laws of the organization, and on the general law. The rights of members of unincorporated organizations are based on contract, the terms of which are found in the express rules of the organization, and on the general law.[196]

5(a) Membership: Admission and Termination

(i) Admission

Membership eligibility in nonprofit organizations in Alberta is determined either by statute[197] or by an organization's by-laws[198] or both[199]. In organizations with a share structure the terms of admission are usually simply the purchase of shares, but can be more specific. For example, the Cemetery Companies Act contains a further proviso that the shareholder must be a "proprietor of a cemetery lot containing not less than 100 superficial square feet who has paid 25% or more of the price of the lot."[200] In organizations without a share structure, the terms of admission will vary from organization to organization according to the type of organization. With the exception of organizations that provide "services or facilities customarily available to the public,"[201] and trade unions, employers' organizations, or occupational associations,[202] nonprofit organizations in Alberta are not required to comply with the Individual's Rights Protection Act. This means that Women's Institutes can restrict membership to women, the Petroleum Club can restrict its membership to men, and other organizations can restrict their membership on terms that might otherwise be discriminatory, as long as they are not providing services or facilities customarily available to the public. These terms have been broadly interpreted in Alberta in three decisions.[203] In *Weaselfat v. Driscoll*[204] an Alberta board of inquiry determined that a gas station had discriminated against native Indians under the Alberta Human Rights Act[205] by requiring them to pay in advance for gasoline and other goods and services offered by the gas station. The gas station customarily extended credit to the public during the time required to complete a purchase. To deny the same service to native Indians was discriminatory.

The provision of services and facilities to the public became an issue in relation to public schools in *Re Schmidt and Calgary Board of Education*[206] where it was alleged that certain sections of the School Act[207] contravened the Individual's Rights Protection Act.[208] The sections in question required the complainant taxpayer to sign a document denying that he was a Roman Catholic. If he failed to do so he would be required to pay non-resident fees in order to have his children attend the public school system. On appeal to the Supreme Court of Alberta it was held that the School Act should be read subject to the Individual's Rights Protection Act. Shannon, J. stated that the latter Act should be broadly and liberally interpreted.[209]

> An institution or establishment does not lose the quality of being a place of public accommodation simply because some members of the public are excluded from it. If one was considering a private commercial operation such as a licensed bar or tavern there would be no doubt that it would be considered to be a place of public accommodation within s.3 of the Act. Nevertheless all members of the public are not permitted to enter bars or taverns in the Province of Alberta.

The Alberta Court of Appeal unanimously allowed the appeal from this decision, but on other grounds.[210] The interpretation of Shannon, J. therefore stands.[211]

The 1980 case of Blodel v. Board of Governors of the University of Calgary[212] applied the decision of Shannon, J. in the Schmidt case and decided that the programs, services and facilities of the University were services and facilities customarily available to the public. Accordingly, the University had discriminated against non-native students by offering a program of upgrading to native students only.

Two more recent cases seem to place a narrower interpretation on the meaning of "services and facilities customarily available to the public."[213] In Calgary Board of Education v. Deyell[214] the Alberta Court of Queen's Bench decided that while public school education is a service customarily available to the public, special grants made by the school board for private school education are not.

Similarly, in Bourque v. Board of Trustees of Westlock School Division No. 37[215] the Alberta Court of Queen's Bench decided that school bus transportation is also not a service customarily available to the public. School bus transportation had become an issue for the complainant separate school supporters whose children had been denied access to the public school transportation system. The School Act[216] only required the School Division to provide school bus transportation for students resident in the public school district.

Mr. Justice Tarnopolsky, in the second edition of Discrimination and the Law, is of the opinion that

> ...Canadian law remains in an unsatisfactory state....From this review of the cases it is evident that the two difficult issues must be faced:
>
> (i) can a service which is offered to the public be restricted, and if so, on what basis?
>
> (ii) what selection or screening process is required to remove the service or facility from the public domain?
>
> In addressing these issues, several obvious points must be remembered. First, one cannot restrict an otherwise freely available service on the basis of a prohibited ground of discrimination, unless this is expressly authorized in the legislation. Any other approach would render the Codes useless as guarantees of equal access. Further, any restriction on the scope of the service offered must be done in good faith, and not for purposes which are contrary to the objects of the legislation. With respect to the second issue, it is suggested that the English cases discussed earlier in this section offer the most useful guidance. Some meaningful selection or screening process should be required before an organization or place will be found to be "private". Admission fees, restrictions on hours of operation,

> restricted capacity caused by physical limitations or other similar confining factors should not suffice to exempt a service, facility or accommodation from the legislation.[217]

The English cases to which Mr. Justice Tarnopolsky was referring involved membership in clubs.[218] The House of Lords in both cases decided that it was not an offence to discriminate on racial grounds if there was "genuine selection on personal grounds in electing candidates for membership."[219]

In Alberta there is no requirement for genuine selection or screening processes to determine the membership eligibility in nonprofit organizations. Nor is there any requirement that membership eligibility be determined in accordance with the Individual's Rights Protection Act unless an organization offers services and facilities customarily available to the public, or is an occupational association. And as the cases discussed above indicate the determination of what constitutes a service or facility customarily available to the public is decided on a case-by-case basis.

If the terms of admission to membership in a private nonprofit organization need not comply with the Individual's Rights Protection Act, are they also exempt from compliance with the equality provisions of the Charter of Rights and Freedoms?[220] In other words, can an individual who has been denied membership in a nonprofit organization maintain a cause of action against the organization on the basis of a breach of a Charter right? Does the Charter apply to private litigation unconnected with the government? The Supreme Court of Canada in the 1987 decision of R.W.D.S.U. v. Dolphin Delivery was of the view that the Charter was intended "to regulate the relationship between the individual and the government...It was not intended in the absence of some governmental action to be applied in private litigation."[221] The type of "governmental action" which must be present, although "difficult to define"[222] was illustrated in Re Blainey and Ontario Hockey Association et al[223] in which the Ontario Hockey Association was acting on the authority of the Ontario Human Rights Code[224] which allowed athletic organizations to restrict membership on the basis of sex. The Ontario Court of Appeal decided that section 19(2) of the Ontario Human Rights Code was in contravention of the Charter. The Blainey case provides "...an illustration of the manner in which Charter rights of individuals may be enforced and protected by the courts, that is, by measuring legislation - government action - against the Charter."[225]

Because of the decisions in the Dolphin Delivery case and the Blainey case it must be concluded that the terms of admission to membership in a nonprofit organization in Alberta need not comply with the equality provisions of the

Charter except where governmental action is present, specifically, where one private party relies upon governmental action "to produce an infringement of the Charter rights of another."[226]

In summary there are four potential controls on the right to be admitted to the membership of a nonprofit organization:

1. the governing statute,
2. an organization's by-laws,
3. the Individual's Rights Protection Act, and
4. the Charter of Rights and Freedoms.

The statutory terms of admission and those contained in an organization's by-laws vary from statute to statute and from organization to organization, reflecting the individuality of nonprofit organizations in Alberta. With few exceptions the terms of admission need not comply with either the protections afforded by the Individual's Rights Protection Act or the Charter of Rights and Freedoms, leaving nonprofit organizations free to build their memberships in ways which most appropriately support their purposes and objectives.

(ii) Termination

Membership termination can be by withdrawal by the member, suspension of the member, or expulsion of the member. The Societies Act is the only nonprofit statute in Alberta which provides for membership termination. In order for societies to become registered, section 5(4)(b) of the Act requires them to enact by-laws with provisions for "the conditions of withdrawal of members and the manner, if any, in which a member may be expelled."[227] Organizations incorporated under other statutes are not required to provide for membership termination, but some do provide for it in their by-laws. For example Article V of the Constitution of the Alberta Women's Institutes provides for the forfeiture of membership of member Institutes for failure to pay annual dues for one year. Article V further provides that "A forfeited membership may be restored upon application to the Provincial Council."

If there are no statutory or other rules providing for termination, the position in English law is that a member of an unincorporated association cannot be suspended or expelled[228] until such time as the organization passes some rules.[229] However, a member can resign from an unincorporated association in the absence of rules relating to resignation, by either directly informing the association or by conduct which clearly indicates the intention to resign.[230]

If there are rules providing for the termination of membership, the organization must comply with those rules. The following three cases illustrate this point.

The question of expulsion for undesirable conduct was considered in Philipzyk v. Edmonton Real Estate Board Co-Operative Listing Bureau Limited.[231] There the member, a licensed real estate salesman was expelled from the membership of the Edmonton Real Estate Board for making derogatory remarks about another member, and for failing to comply with the disciplinary action taken against him as a result. He was expelled pursuant to the supplemental by-laws of the organization. However, those by-laws were not in compliance with statutory and standard by-law amendments made subsequent to the enactment of the supplemental by-laws. The amended by-law provided that before a dismissal could take effect the Board of Directors must "invite the member concerned to attend a Board meeting, at which time the reasons for dismissal will be discussed, and the member allowed to present his objections, if any, to such dismissal."[232] The expelled member was not present at the meeting at which it was decided that he was to be expelled, he was not given notice of the meeting, nor was he given an opportunity to make representations. Accordingly, the Appellate Division of the Alberta Supreme Court held that because the requirements of the new legislation and by-laws were not satisfied, the expulsion of the member was not lawful.

In *Philipzyk*, *supra* the issue was membership and the right to continue working. In other organizations membership may involve other rights, such as occupancy rights. This became an issue in *Liberty Housing Co-operative Society* v. *Way and Way*[233] where a co-operative society voted to terminate the occupancy rights of two of its members for continuously defaulting in the payment of their monthly housing charges. Under the by-laws of the society a termination of occupancy rights is deemed notice of intention to withdraw from membership in the co-op. The society did not give the members written notice of the meeting at which it was decided to terminate the members' occupancy rights. The society's by-laws required that written notice be given to the members ten days prior to the meeting, and that the members be given an opportunity to make representations personally, by agent, or by counsel. The Newfoundland District Court found that the membership rights of the defendants had not been properly terminated in accordance with the requirements of the by-laws.

The court has also been required to consider whether the rules of natural justice apply in the context of the termination of membership rights. A member of the Sikh Cultural Society complained that his membership rights had been improperly terminated. In Narwal v. Sikh Cultural Society; Gosal v. Sikh Cultural Society[234] the Supreme Court of British Columbia was asked to determine whether the rules of natural justice had been breached in a matter which resulted in the expulsion of several members from the Sikh Cultural Society. One of the expelled members petitioned for a declaration that the expulsion was null and void on the basis of a violation of the rules of natural justice. The petitioner had been advised of the meeting which had been called to consider his expulsion in accordance with the society's by-laws. The petitioner received the notice on December 1 but did not inform the board of directors of his inability to attend until December 9, the day of the meeting. The board advised the petitioner of their intention to proceed notwithstanding, having previously granted him an adjournment of eight days. The court dismissed the petition and found as follows:[235]

> In the circumstances, I find that the board of directors had a discretion as to whether they should continue the hearing or adjourn it and I cannot say that they exercised that discretion improperly or that an injustice was done.

In each of these cases the organizations involved had by-laws which required that certain procedures be followed before a membership could be terminated. These procedures required that the member be notified of any meeting at which his membership rights may be terminated, and that the member be given an opportunity to make representations. In the absence of such rules can it be said that the member has any protection? Will the rules of natural justice apply? Does a nonprofit organization have a duty to be fair?

Natural justice and the more recent concept of the duty to be fair are both principles of administrative law.[236] Administrative law "deals with the legal limitations on the actions of governmental officials, and on the remedies which are available to anyone affected by a transgression of these limits."[237] Government officials or administrators are granted or delegated powers by laws enacted by the federal Parliament or the provincial legislatures, and can "delegate virtually any power...to the cabinet, a particular minister, a particular civil servant, a judge, or someone else," even to private individuals.[238] It is these administrators or officials who are required to adhere to the principles of administrative law, including the rules of natural justice and the duty to be fair. Administrators of nonprofit organizations will be bound by these same principles _if_ they are acting by virtue of an authority delegated by federal

Parliament or a provincial legislature. It is not enough that the organization was set up by a statute. There must be a clear delegation of power or authority. For example, in Abouna v. Foothills Provincial General Hospital Board[239] the constitution and jurisdiction of the Foothills Hospital Board were delegated to it by an act of the Legislature, and the Hospital itself was owned and created by the Legislature. Therefore, the Board was bound by the principles of administrative law. In particular, the Trial Division of the Alberta Supreme Court ruled that the Board was required to observe the rules of natural justice because in the matter in question it was acting in a quasi-judicial manner.

The characterization of function as quasi-judicial is no longer significant in Canada in order to remedy a breach of the rules of natural justice, or the duty to be fair.[240] Five leading cases between 1978 and 1980[241] reviewed and extended the scope of judicial review in Canada to the point where "instead of characterizing functions as judicial or executive, the courts must now concentrate squarely on the real question which has always been before them: Was the procedure used in this case fair in all circumstances?"[242] As a result of this new approach a court's finding that no quasi-judicial or judicial function was involved will no longer mean that administrators can utilize any procedure, no matter how unfair. Administrators will now be required to be fair in all circumstances.

The delegation of certain powers and authority could arguably attract the rules of natural justice. The Abouna case, supra, is an example of a nonprofit organization which had been delegated certain powers and authority by the legislative branch. Most nonprofit organizations are, however, not in this category and will not be bound by the principles of administrative law. Unless their own by-laws so provide, they will not be bound by these principles. In particular, the directors of nonprofit organizations will not be required to observe the rules of natural justice when terminating a membership. The Institute of Law Research and Reform was of the view, however, that they should be and recommended that where nonprofit organizations confer "upon anyone the power of terminating memberships (as differentiated from providing for automatic termination by lapse of time or failure to attend meetings or to pay levies), the power should be exercised in accordance with natural justice."[243] This recommendation is embodied in section 31(3) of Bill 54, the proposed Volunteer Incorporations Act.[244]

> Except in the cases of termination for non-payment of fees, dues or other similar levies and termination due to lapsing of time, a director, member or committee

> acting under subsection 2(a) must observe the rules of natural justice.

Subsection 2(a) provides that the by-laws may

> ...confer on the directors or members, or any committee of directors or members, power to terminate a membership for reasons prescribed in the by-laws,...

Saskatchewan's Non-Profit Corporations Act[245] contains provisions which require directors of nonprofit corporations to observe what amounts to the rules of natural justice. It provides that members of nonprofit corporations are entitled to a fair hearing before their memberships are terminated. The Act further provides that a member who is aggrieved because his membership was terminated may apply to the court which can rectify the matter if it finds that the non-profit corporation or its directors had exercised its powers in a way that was "oppressive or unfairly prejudicial to or that unfairly disregarded the interests of any member,..."[246] For example, in the case of Banda v. Romanian Canadian Cultural Club[247] the plaintiff applied to the court when his membership was suspended indefinitely for misconduct. He complained that the action taken against him was a denial of natural justice and that the executive had been oppressive and unfairly prejudicial to him. The Saskatchewan Court of Appeal found that the directors "were acting in what they believed to be the best interests of the Club and were not acting in bad faith or unfairly towards the respondent."[248]

They also found that the plaintiff had been a given a fair hearing before the directors and before the general membership who also voted in favour of the plaintiff's suspension. It is interesting to note that the Saskatchewan Court of Appeal, in addition to considering the administrative law principles of natural justice set out in the Non-Profit Corporations Act, looked to principles of business corporation law in finding that the directors of the Romanian Canadian Cultural Club had acted in the best interests of the club when they terminated Banda's membership.

In summary, rules regarding membership termination can be provided for

(1) in the statute under which the nonprofit organization is formed,
(2) in the by-laws of the organization, or
(3) in both the statute and the by-laws.

They may contain procedures for termination which are essentially an enactment of the rules of natural justice or the duty to be fair. If they do not and an aggrieved member whose membership has been terminated wishes to assert his right to be treated according to those rules, it will be necessary to determine whether or not the nonprofit organization in question was acting by virtue of a power or authority delegated to it by Parliament or a provincial legislature.

5(b) Control of the Organization

Business corporation law has been undergoing a process of reform in many areas, including the rights of members. These reforms have, for the most part, been with respect to the protection of the rights of minority shareholders. Corporations have traditionally been governed by the will of the majority, often at the expense of the minority, a situation which has often come into question by the oppressed minority as well as by legal commentators.[249] Professor Welling suggests that minority rights are a fiction because of majority rule, and that the appropriate approach to the problem is to devise a system of procedural remedies for the minority, as opposed to focussing on their rights.[250] These remedies would require the majority to:

> (i) conform to the rules set out in the corporate constitution; and
> (ii) compromise their oppressive behaviour, where such behaviour is occurring; (or, where this proves practically impossible),
> (iii) ...pay the disgruntled minority fair compensation in exchange for their leaving the joint enterprise.[251]

In actual fact this procedural remedy approach is being used in the reformed corporate statutes in Canada, including the Business Corporations Act in Alberta. The Institute of Law Research and Reform has recommended that these same remedies be made available to nonprofit organizations in the appropriate circumstances, although recognizing that because of the existence of the distribution constraint and the non-share structure of most nonprofit organizations in Alberta, some of the minority shareholder protective devices would be unnecessary.[252]

(i) The Right to Vote

Both incorporated and unincorporated organizations operate by vesting the responsibility of management in an elected board of directors or a management committee. This vesting or delegation of management authority is not absolute. The members retain the ultimate control through rules or by-laws which limit the length of time for which directors can remain on the board, or committee members can remain on the management committee, requiring them to be elected at regular intervals.[253] The right to elect directors, in particular, and the right to vote generally, is a membership right which is intended to protect the members' interests in an organization by providing them with a voice in the operation of the organization. This voice has traditionally been a collective one because corporate organizations operate on the democratic principle that the majority shall govern.[254] The voice is heard through the exercise by the members of the right to vote. In business corporations votes are either on a one vote per shareholder basis or are tied to the number of shares held, depending on the circumstances. In nonprofit organizations, with the exception of nonprofit companies limited by shares under the Companies Act, and cemetery companies incorporated under the Cemetery Companies Act, there is no share structure. Voting in these organizations is therefore on the basis of one vote per member.

The right to vote is generally protected by statute or by an organization's constitution and by-laws. For example, under Alberta's Societies Act a society is required to provide for voting rights in its by-laws;[255] Article IV of the provincial by-laws of the Women's Institutes defines who is entitled to vote at Annual Conventions, while section 16 of the Women's Institutes Act provides for the general right of members to vote;[256] section 10(3) of the Agricultural Societies Act provides that only paid up members may vote for directors of the society;[257] the number of votes per share in a cemetery company is determined by section 17 of the Cemetery Companies Act;[258] the right of members in religious societies to vote is determined by the practice or the constitutions of religious societies, churches or congregations;[259] and the right of members or shareholders of nonprofit companies to vote is set out in section 151(1)(f) of the Companies Act "insofar as the articles of the company do not make other provision in that behalf..."[260]

While the right to vote is an essential and useful mechanism by which members can participate in the operation of their organization, it is not always effective. Because majority vote rules, the votes of the minority are of no consequence. This can be particularly oppressive in an organization with a share structure where a vote has been tied to shares. In such a case it is the majority of shares, not the majority of shareholders, which carry electoral power. For example, shareholders holding more than 50% of the voting shares will be able to decide a particular issue which may significantly alter the future course of the organization, while those holding less than 50% of the shares will have no effective voice, even though the minority shareholders may outnumber the majority shareholders by 3:1. Even in organizations in which voting is on the basis of one vote per member, there will be circumstances in which the interests of the company will be frustrated by the interests of the majority. However, unless those in control of the management of the organization outnumber the other members, there is less likelihood of a management group discriminating in their own favour to the detriment of the rest of the membership where voting is on the basis of one member - one vote.

The concept of one member - one vote will be included in Bill 54, the proposed Volunteer Incorporations Act, as will the concept of voting on the basis of shareholding. Section 59(1) provides as follows:

> Unless the articles otherwise provide, each member of an incorporated association is entitled to 1 vote at a meeting of members.

This section will allow the articles to provide for a different voting scheme, for example, where an association is formed with a share capital which is divided into different classes of shares. It would also be possible under this section to provide for different classes of memberships with different voting rights.

(ii) The Right to Elect Directors

In theory the right to elect directors and to remove them makes members "the most powerful voice in corporate politics, for it is they who can determine the make-up of the board of directors in whom is vested the power to determine the course of the corporation's life."[261] Although this is probably truer for smaller organizations then it is for larger ones, as Professor Welling points out, in reality it is of limited significance even to the small organizations.[262] Their members and directors are usually the same people. They create the organization, elect the directors from amongst themselves, and manage the operations of the organization. They hold annual meetings and elections primarily to comply with the legal requirements of their rules or by-laws or the statute under which they were incorporated. In large corporations operations are normally the responsibility of professional managers who recommend to the members the most suitable individuals to elect to the board of directors, thus rendering their election as little more than a legal formality as well. However, this seems to be a function of "economic reality" as opposed to a function of law.[263] In smaller organizations the members are usually willing participants in a cause or activity to which all are committed and are desirous of contributing. In larger organizations, the members, although supportive of the organization's purposes, are generally more inclined to contribute by way of monetary donation, and less inclined to contribute by way of active participation.

The right to elect directors in nonprofit organizations in Alberta is found in either the statute under which an organization is formed, or an organization's by-laws. For example, Alberta's Societies Act requires the by-laws of a society to contain provisions regarding the appointment and removal of directors;[264] the election of directors of nonprofit companies incorporated under Alberta's Companies

Act is provided for in the articles of association;[265] Article VII of the Constitution of the Women's Institutes provides for the election of the Institutes' officers;[266] section 10 of the Agricultural Societies Act provides for the election of directors, while an agricultural society's by-laws provide for the election procedure;[267] and section 16 of the Cemetery Companies Act provides for the election of directors of cemetery companies.[268] Officers of religious societies formed under the Religious Societies' Land Act are simply set out in the declaration of incorporation,[269] and can presumably be removed or replaced by way of an amendment to the constitution under section 15(1)(a) of the Act since there is no specific provision for the election of directors or officers in the statute.[270]

Although the right of members to elect directors is a significant mechanism by which members can exert some control over the operation of their organization, it too can be frustrated by the operation of the principle that majority vote rules. The general rule in corporations formed with a share structure allows shareholders holding more than 50% of the voting shares to elect or remove 100% of the directors.[271] The situation is not as critical for non-share organizations in which directors are elected on the basis of one vote per member.

(iii) Meetings and Resolutions

Meetings are the forum and resolutions are the tool by which the members of an organization exercise their rights, They provide the opportunity and the means to review the performances of directors, elect new directors, and in general pass judgment on management and their conduct of an organization's operations.

There are two types of meetings in which members participate. One is the annual general meeting which most nonprofit organizations in Alberta are required by statute to convene.[272] Some of the statutes specify what business must be conducted at the annual general meeting. For example, section 21 of the Societies Act requires that an audited financial statement be presented at the meeting; section 26 of the Women's Institute Act requires a reading of the minutes, reports of officers, reports of committees, unfinished business, election of officers, new business, appointment of committees, appointment of delegates to annual conventions, and addresses and discussion; section 20 of the Agricultural Societies Act requires a reading of the minutes, addresses and reports of officers, reports of committees, unfinished business, addresses and discussions, and election of officers. In organizations where the statute does not specify the order of business for the annual general meeting, the meeting is used to take care of "matters of an annually recurring nature" like the presentation of accounts and reports, the appointment of officers, and the election of directors.[273] Gower points out that:

> The annual general meeting is an important protection to members, for it is the one occasion when they can be sure of having an opportunity of meeting the directors and of questioning them on the accounts, on their report, and on the company's position and prospects. It is at this meeting that, normally, a proportion of the directors will retire and come up for re-election, and at which the members will be able to try to exercise their only real power over the board-that of dismissal. Moreover, it affords members an opportunity of moving resolutions on their own account. Most of these things could, of course, be done at an extraordinary meeting. The annual general meeting is valuable to them because the directors must hold it whether they want to or not.[274]

In addition to attending to "matters of an annually recurring nature," the annual general meeting can also be used to take care of any other matters that require consideration.

The second type of meeting is the special or extraordinary general meeting at which matters other than of an "annually recurring nature" are considered. The convening of this type of meeting is usually determined by an organization's by-laws,[275] or by the directors.[276] The directors of nonprofit companies incorporated under the Companies Act are required to convene an extraordinary general meeting upon the requisition of the holders of not less than 10% of the shares carrying voting rights, or in the case of companies not having a share capital, upon the requisition of the members having 10% of the voting rights.[277] If the directors fail to hold the meeting within 21 days of the requisition, the requisitionists representing more than 50% of the voting rights may convene the meeting.[278] Although this gives members the power to hold meetings and the opportunity to exert some control over the operations of the organization, Gower suggests that there are inherent weaknesses in such provisions.[279] First, it may be difficult to obtain the support of the members representing 10% of the voting rights, especially in an organization with a "large and dispersed membership."[280] Second, it may be even more difficult to enlist the support and to mobilize the members representing 50% of the voting rights in order to convene an extraordinary general meeting, again in the case of an organization with a sizable membership which is widely dispersed. However, it is submitted, notwithstanding these weaknesses, that members of nonprofit companies incorporated under the Companies Act are in a better position to exercise some control over management because of these provisions, than are the other nonprofit organizations incorporated under statutes which contain no similar provisions. None of the other nonprofit statutes in Alberta contain provisions which give members the right to have extraordinary or special meetings convened.

There are two types of resolutions used by nonprofit organizations in Alberta. One is the ordinary resolution which requires only a simple majority,[281] and the other is the extraordinary or special resolution which requires a 3/4 majority, and of which members must be given proper notice.[282] The decision as to which type of resolution is used in a given circumstance is determined by the statute and the by-laws. For example, under the Companies Act a special resolution is required for an alteration of share capital, an alteration of the articles, a change of name, and the continuation of the company in another jurisdiction, as well as in several other circumstances.[283] Under the Societies Act a special resolution is required for an alteration of society's by-laws and objects, and to surrender a society's certificate of incorporation for purposes of dissolution.[284]

The effectivness of the membership's participation in the monitoring of an organization's operations depends to a certain extent on the effective use of meetings and resolutions. Gower suggests that while the interests of the members may often be frustrated by the machinery of the organization's procedures, member apathy is often a contributory factor when members' fail to "exercise such powers as the law affords them".[285] For example, at the 1987 annual general meeting of an Edmonton-based pro-choice group, only 20 of a possible 600 members attended, 10 of whom were board members. And, with the exception of one individual, all non-board members followed management's recommendations without question. Gower points out that this situation is not necessarily bad, that the complicated nature of many organizations necessitates that the views and opinions of the "experts," i.e. management, should prevail.[286] However, he also notes that "members ought to have de facto as well as de jure control," and that this might best be accomplished "by making meetings a preliminary to voting but not the occasion of voting.[287] This would give members the opportunity to hear both sides of an issue, presumably reflect on the debate, and vote by postal ballot at some later date. Gower suggests that this system would work even where members did not attend meetings, but followed the issues as reported in the media, which would likely be the case for large public companies only.[288]

Professor Welling also agrees that member participation is largely illusory.[289] He sees the problem not as an inability of the majority of members to control an independent management, but rather as an inability of the interested minority to reach and activate the silent majority.[290] This inability is a function of apathy as well as of the organizational machinery which concentrates power and control with management.

Various remedies have been implemented in the reformed business corporation statutes in Canada. Some of these have been suggested for the nonprofit sector and will be discussed below under "Members' Remedies".

5(c) Members' Remedies

The remedies available to members of unincorporated and incorporated nonprofit organizations differ in that they are derived in the former case from the law of contract and the general law, and in the latter case from the incorporating statute and an organization's by-laws. Under English law, the court will intervene to protect the rights of members of unincorporated associations "...by ensuring that the rules, or terms of the contract are observed.[291] The effectiveness of this remedy will therefore be determined by the breadth and depth of an association's rules, since the courts cannot provide a remedy for a transgression which was not contemplated by the rules. The same can be said with respect to the remedies available to members of incorporated organizations. However, and especially with respect to the reformed nonprofit corporation statutes, the remedies available to members of incorporated nonprofit organizations, are generally less limited and more formal than are those for the less structured unincorporated nonprofit organizations.

Three nonprofit statutes in Alberta provide remedies for members who have become frustrated in their attempts to exercise some control over the management and operation of their organization. The Societies Act provides that the by-laws of a society may include a provision for the use of the arbitration procedure[292] under the Arbitration Act[293] for disputes between members, or between members and the society or a director or officer. The decision which is made pursuant to the arbitration is binding and may be enforced by the Court of Queen's Bench. It cannot be appealed unless the by-laws provide otherwise.

The Agricultural Societies Act requires the Director of Agricultural Societies to investigate the affairs of a society upon the written request of 10 members of a society.[294] The Director must determine "whether the affairs of the society are being conducted in a proper manner or that the activities being carried out by the society are those activities permitted under the objects of the society."[295] If the Director feels that the affairs of a society are not being conducted in a proper manner or the society is carrying on activities that are outside its objects, he may give written notice to the society requiring them to bring their affairs into order, or he may appoint himself as manager of the society to bring their affairs into order, or he may dissolve the society.[296] When the Director becomes manager he assumes all the powers of the board of directors and the members, and the board may not carry out any of its functions unless they have been directed or permitted to by the Director.[297]

Under the Companies Act there are provisions which give members the right to call a meeting of the company, unless the articles provide otherwise. Section 151(1)(c) provides that

> ...2 or more members holding not less than 10% of the issued share capital, or if the company has not a share capital, not less that 5% in number of the members of the company, may call a meeting;...[298]

Another remedy for members of nonprofit companies exists with respect to the alteration of a company's objects in its memorandum of association. Under section 34(5), the Court, when considering the alteration proposed by the company, must

> ...have regard to the rights and interests of the members of the company or any class of them,...and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and the Court may give any directions and make any orders it thinks expedient for facilitating or carrying into effect the arrangement, but no part of the capital of the company may be expended in any such purchase.[299]

The Companies Act also contains a provision whereby the members can apply to the Court of Queen's Bench for the appointment of an inspector "to investigate the affairs and management of the company."[300] The Court may also appoint an auditor to audit the company's books. In addition, an inspector can also be appointed by the company by way of a resolution. The reports of an auditor and an inspector have no legal effect except as evidence in a legal proceeding.

(i) Investigation and Information

Members' remedies can also be provided for in the by-laws of a nonprofit organization. These can be in addition to those already provided by statute, or where the incorporating statute provides no remedies for members, the remedies in the by-laws would be the only ones available. Because it is not mandatory that members' remedies be provided, it would obviously be more advantageous if they were provided for in the incorporating statute. The Institute of Law Research and Reform has recommended that certain specific remedies be included in the proposed Volunteer Incorporations Act for the protection of members and of the public interest.[301] The first recommendation gives a current member or a member whose membership terminated not more than a year before the application, the right to apply to the Court of Queen's Bench for an order for an investigation of the organization.[302] The Court can appoint an inspector to determine if there has been any fraud, dishonesty, or oppression in the activities of the organization. The inspector's report has no legal effect other than as evidence in other proceedings. This is similar to the provision for nonprofit companies in the Companies Act,[303] but of less effect than the provisions relating to investigations by the Director of Agricultural Societies under the Agricultural Societies Act discussed above.[304]

The investigation procedure is one of the remedies available to the shareholders of business corporations to assist them in obtaining information with respect to the management of the organization. The other means of obtaining information include the requirement for independent auditors and audited financial statements, and the appointment of a civil servant, who, among other duties, will be required to make certain information available for inspection by interested parties.[305] Part 13 of Alberta's Business Corporations Act provides for financial disclosure,[306] while section 259 of the Act requires the Registrar of Corporations to make certain information available for inspection.[307] Similar provisions have been included in Bill 54,[308] thereby providing members of nonprofit organizations with the same opportunities to obtain information about the management of the organization that are presently available to shareholders of business corporations.

(ii) Derivative Action

The second recommendation made by the Institute of Law Research and Reform was with respect to what is referred to as a "derivative" action,[309] a remedy currently available to shareholders of business corporations under Alberta's Business Corporations Act.[310] The Institute recommended that the members of nonprofit organizations be given the opportunity to take the appropriate steps when the interests of the organization are not being properly protected.[311] In the absence of this type of provision, only the organization has the right to sue or to intervene in an existing lawsuit in order to obtain redress when the organization has been wronged. A member who wishes to invoke the legal process when management refuses or fails to do so will have to persuade the majority of members to his point of view, and then mobilize or replace the board or directors, since it is they who have the power to commence litigation in the name of the organization.[312] The provision recommended by the Institute and embodied in section 127 of Bill 54 eliminates the need for the minority member to convince the majority, and it eliminates the need for the majority to persuade the directors to take action to remedy the wrong. The following people, acting alone, may avail themselves of the remedy:[313]

(i) a member or former member of an incorporated association or any of its affiliates,
(ii) a director or an officer, or a former director or officer, of an incorporated association or any of its affiliates, or
(iii) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

Any of these complainants may apply to the Court of Queen's Bench for permission to commence an action on behalf of the organization or to intervene in an ongoing action on behalf of the organization. Before the Court will grant the complainant leave, the complainant must satisfy the Court that he has notified the board of directors of his intention to apply to the Court, that it appears unlikely that the board of directors will take action in the matter, that the complainant is acting in good faith, and that it is in the best interests of the organization that action be taken in the matter.

(iii) Compliance Order

Another remedy which is available to shareholders of business corporations is the compliance order. Under section 240 of the Business Corporations Act a shareholder can apply to the Court of Queen's bench for an order directing the corporation, or any of its directors, officers or other officials, including its members and employees, to comply with the statute, regulations, articles, by-laws or unanimous shareholders' agreement.[314] The Institute of Law Research and Reform was of the opinion that the same remedy should also be available to nonprofit organizations.[315] Accordingly section 135 of Bill 54 provides as follows:[316]

> If an incorporated association or any member, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager, or liquidator of an incorporated association contravenes this Act, the regulations, the articles or the by-laws, a complainant or a creditor of the incorporated association may, in addition to any other right he has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening the relevant provision, and on the application the Court may so order and make any further order it thinks fit.

As the Institute pointed out in its report on nonprofit organizations, the Court already has such powers without express provision in a statute.[317] However, as Professor Welling notes the statutory inclusion is useful in that it provides a "statutory grant of standing to invoke judicial discretion" that the complainant member would not otherwise have.[318]

(iv) Oppression Remedy

Another remedy which is available to shareholders of business corporations was specifically not recommended for inclusion in a new statute for nonprofit organizations. This was the oppression remedy which, under the Business Corporations Act, allows a complainant to sue on his own behalf if the rights of shareholders, directors, officers or creditors are being oppressively or prejudicially affected by a business corporation or its directors.[319] In deciding that the oppression remedy was unnecessary for nonprofit organizations, the Institute of Law Research and Reform reasoned as follows:[320]

> This section [of the Business Corporations Act] is for the protection of a shareholder's economic interests, either exclusively or primarily. If an incorporated association has both the income and liquidation distribution restrictions, a member does not have an economic interest to be defended. It is true that if an association has only the income distribution restriction, a member may have an economic interest. However, the economic interests of members in incorporated associations are characteristically less great than the interests of shareholders in business corporations, and the division between ownership and control is characteristically less, so that the need for protecting the personal interests of members against the directors is less. We think that on the whole, the need for protection is not substantial enough to outweigh the degree of interference with corporate proceedings which is involved in the oppression remedy, and we do not think that the oppression remedy should be included in the proposed statute. The derivative remedy and the compliance order are, we think, sufficient protection for members of incorporated associations.

One jurisdiction which has taken the opposite view is Saskatchewan. Its Non-Profit Corporations Act includes the oppression remedy in substantially the same terms as it appears in Alberta's Business Corporations Act.[321] The

Saskatchewan provision is somewhat broader than the Alberta provision in that it applies with respect to situations involving a charitable corporation where the interests of the general public have been oppressively or unfairly prejudiced or unfairly disregarded. The provision in Alberta's Business Corporations Act extends only to the interests of security holders, creditors, directors, or officers.

The oppression remedy in the Saskatchewan Non-Profit Corporations Act was considered in the following two cases. In Nameth v. Regina Real Estate Association Inc. et al[322] a member of the Regina Real Estate Association lost his membership when he failed to become a full-time realtor as required by a by-law which prohibited part-time realtors from membership in the Association. The loss of membership would mean an attendant loss of rights and privileges, thereby impairing the plaintiff member's ability and opportunity to work and earn an income as a realtor. The member applied to the court under section 215 of the Non-Profit Corporations Act for a declaration that the by-law was oppressive or unfairly prejudicial. The Saskatchewan Court of Queen's Bench dismissed the application and found that neither the Association nor its directors had been guilty of any improper conduct as contemplated by section 215, they had not acted in a burdensome, harsh or wrongful manner, it was not established that there was a lack of probity or fair dealing, and finally the evidence did not show that anything was done in a manner that was unfairly prejudicial or that unfairly disregarded the interests of any member of the Association or of the plaintiff member in particular. The evidence did show that the by-law was passed by a large majority of members at a well-advertised and well-attended membership meeting, that the by-law was not targeted at the plaintiff personally, and that there was no evidence of bad faith in the enforcement of the by-law in regard to the plaintiff.[323]

The second case involving section 215 of Saskatchewan's Non-Profit Corporations Act was Banda v. Romanian Canadian Cultural Club, discussed above.[324] A member of the Romanian Canadian Cultural Club whose membership had been suspended indefinitely for reasons of misconduct, alleged that the club, represented by its directors, had acted oppressively and unfairly toward him in terminating his membership. The termination of Banda's membership meant the loss of his position as general manager of the Club. It also meant he would not be permitted to continue to operate the restaurant he had established on the Club's premises to provide food and drinks to the club members. The Saskatchewan Court of Appeal found that the directors had not acted oppressively or unfairly toward the member, but had acted in the Club's best interests based on their belief that the member Banda had betrayed his trust.[325]

Both the Nameth case and the Banda case demonstrate that the economic interests of members of nonprofit organizations can be significant. The loss of membership in the Nameth case jeopardized the member's ability to earn an income, while the loss of membership in the Banda case removed the member's ability to continue to operate the Club's restaurant and terminated his position as general manager. On the basis of these two examples it is submitted that it would not be inappropriate to make the oppression remedy available to nonprofit organizations in Alberta. Even if the circumstances necessitating the inclusion of the oppression remedy are not as substantial as for business corporations, as has been suggested by the Institute of Law Research and Reform,[326] the fact that it may be needed at all is sufficient reason to include it in the proposed nonprofit legislation.

(v) Appraisal Remedy for Dissenting Shareholders

Another remedy which is available to Alberta's business corporations is the appraisal remedy for dissenting shareholders, i.e. the right to dissent and be bought out. Section 184 of the Business Corporations Act permits a shareholder to dissent from certain fundamental changes in the corporation's structure or operations, including changes to his shareholder rights or to the type of business carried on by the corporation, an amalgamation, a continuance to another jurisdiction, or the disposition of the corporation's property.[327] The dissenting shareholder is entitled to be paid the fair market value of his shares by the corporation.[328] The Institute of Law Research and Reform pointed out that this remedy would be most appropriate for those nonprofit organizations having a share structure and accordingly recommended that it be included for them.[329] Section 34(c) of Bill 54, the proposed Volunteer Incorporations Act, provides that section 184 of the Business Corporations Act, discussed above, shall apply to incorporated associations with a capital stock divided into shares.

The Institute of Law Research and Reform also discussed the need for the right to dissent and be bought out with respect to nonprofit organizations without shares which had both an income and liquidation distribution restriction. They concluded that members in those organizations would have no interest to be bought out, so the remedy would be unnecessary for them.[330] The Institute also considered nonprofit organizations without a share structure which had only an income distribution and concluded that the right to dissent and be bought out would be inappropriate because "its [the remedy's] advantage in protecting minority members would be outweighed by the disadvantage of its intrusiveness into private affairs."[331] In an earlier Issues Paper prepared by the Institute the following opinion was expressed:[332]

> A case in which a member of a non-profit corporation is oppressed by a majority decision is conceivable. A golf club might sell its golf course and either buy a new club in an inconvenient location or set up a curling club instead. However, such cases are unlikely to occur, and the interest of a member in a non-profit corporation will rarely have the pecuniary value which, in the case of a minority shareholder, justifies exercising the right to dissent. The Draft Act does not include a provision for dissent and appraisal. The omission is based on the view that extensive and complicated legislative provision should not be made for an evil the existence of which there is no evidence.

While the motive for not including the right to dissent and be bought out for nonprofit organizations without a share structure which had only an income distribution may be proper, it is submitted that it is based on an incomplete understanding of the differences between that type of nonprofit organization and the nonprofit organization with a share structure for which the remedy was recommended to be included. There may in fact be little appreciable difference in the context of membership interests other than the existence or non-existence of the share capital, notwithstanding the Institute of Law Research and Reform's view that because an organization has "opted for share capital" it has thereby "treated itself as close to a business corporation."[333] In fact members in both organizations could have similar economic interests in their respective organizations, one evidenced by a purchased membership, the other evidenced by purchased shares. For example, a member of a private golf club without share capital who paid $2,000.00 for his membership would have the same economic interest in his club as would a member of a private golf club with share capital who paid $2,000.000 for his share. In fact, because of the existence of transfer fees in most golf clubs, a membership can cost as much as $10,000, whether or not the membership is by way of a share purchase. Is one membership more worthy of protection than the other? It is submitted that the existence or lack of existence of share capital is not a difference which should affect the availability of the appraisal remedy. The remedy should be available to members in nonprofit organizations that have only an income distribution restriction, whether or not they are organized with a share capital.

(vi) Unanimous Shareholders Agreement

Another mechanism by which shareholders of business organizations exercise some control over management is the unanimous shareholders agreement.

> If the statute so provides, an agreement among all the shareholders of a corporation has the effect of restricting, in whole or in part, the directors' powers to manage corporate affairs. Simply stated, the unanimous shareholder agreement allows the shareholders to instantaneously strip the directors of their

> managerial powers without going through the time consuming procedure of giving notice of and convening a shareholders' meeting to remove the directors from the board. The unanimous shareholder agreement does not remove the directors from their positions. It simply removes the powers that go with the position of director, to the extent set out in the agreement.[334]

The unanimous shareholders agreement can be used to divide up corporate powers when an organization is first set up. It can also be used to rectify problems created by an unco-operative or otherwise difficult board of directors. It is an appealing mechanism because it does not involve the courts like most of the other remedies. However, it also has its pitfalls including the requirement of unanimity, its questionable ability to bind third parties who have made commitments to the corporation without knowledge of the unanimous shareholders agreement, and its questionable application to officers of the corporation who usually have more to do with the day to day management of a corporation than do directors. In spite of these potential problems, the unanimous shareholders' agreement may be of some use to the members of nonprofit organizations which are experiencing difficulties with the directors of their organizations.

In conclusion, the members' remedies which are currently available under Alberta's Societies Act, Agricultural Societies Act, and Companies Act are useful but limited. They do not contemplate many of the potential problems of nonprofit organizations with respect to the rights of members to exercise some control over the management of their organizations. The members of Alberta's nonprofit organizations could obtain significant benefit by the adoption of the reforms which have developed in the area of shareholders' remedies in business corporation law in Canada.

6. Conclusion

These five areas of corporate structure and function- the distribution constraint, the right to incorporate, permissable purposes, the duties and responsibilities of directors and officers, and the rights of members - are common to all types of nonprofit organizations, regardless of the incorporating statute. And while each statute may have its own particular provision on any given issue, the problems and concerns addressed by the statutes are similar, whether the organization is an agricultural society or a nonprofit company. Every nonprofit organization will at some time in its existence be affected by questions regarding each of the five areas.

There is a further commonality with respect to these five areas of corporate structure and function. Many of the issues which concern nonprofit organizations also affect or have affected business corporations, notably the right to incorporate, permissable purposes, directors' and officers' duties, and members' rights. In light of the many areas in which the interests of all nonprofit organizations overlap and converge, and in which the interests of nonprofit and business organizations do also, the efficacy of similar statutory treatment must be considered. The following chapter will discuss this issue, and others, in the context of the possible alternatives for the statutory treatment of nonprofit organizations in Alberta.

FOOTNOTES - CHAPTER III

1. Distribution Constraint

1. Henry B. Hansmann, "Reforming Nonprofit Corporation Law" (1981) U. of Pa. L. Rev. 497 at 553.

2. Dodge v. Ford Motor Co. 170 N.W. 668 (S.C. Mich. 1919) at 683.

3. Id. at 672.

4. Id. at 671

5. Id. at 684.

6. Id. at 684. See also Parke v. Daily News [1962] 2 All E.R. 929 (Ch. D.), and Hutton v. West Cork Railway Co. (1883) 23 Ch. D. 654 which both support the view that a company's funds are to be utilized for purposes beneficial to or incidental to the business of the company.

7. Companies Act, R.S.A. 1980, c.C-20, s.200.

8. Howard L. Oleck, "Non-Profit Types, Uses and Abuses: 1970" (1970) 19 Cleveland State L. Rev (2) 207 at 211.

9. Daniel Wm. Fessler, "Codification and the Nonprofit Corporation: The Philosophical Choices, Pragmatic Problems, and Drafting Difficulties Encountered in the Formulation of a New Alaska Code" (1982) 33 Mercer L. Rev. 543 at 567.

10. Baz Edmeades, "The Proposed Alberta Nonprofit Corporations Act" (1983) unpublished report to the Alberta Institute of Law Research and Reform, at 3.

11. Societies Act, R.S.A. 1980, c.S-18, s.4(1).

12. Canada Corporations Act, R.S.C. 1970, c.C-32, s.154(1).

13. Agricultural Societies Act, R.S.A. 1980, c.A-12, s.28(1).

14. Supra n. 10 at 4.

15. Supra n. 7, supra n. 11, supra n. 12, supra n. 22.

16. Supra n. 10 at 5.

17. *Supra* n. 9 at 566.

18. *Supra* n. 1 at 533 et seq; H.B. Hansmann, "The Role of Nonprofit Enterprise" (1980) 89 Yale L.J. 835 at 837 et seq.

19. *Supra* n. 11.

20. *Id.* at s.28(6).

21. *Supra* n. 7.

22. Cemetery Companies Act, R.S.A. 1980, c.C-3, s.10.

23. *Id*.

24. Religious Societies' Lands Act, R.S.A. 1980, c.R-14, s.24(5)(a).

25. *Id.* at s.24(5)(b).

26. *Supra* n. 13 at s.41(6).

27. *Id*.

28. *Id.* at s.41(7).

29. Bill 54, The Volunteer Incorporations Act, 21st Legislature, 2nd Session, s.5.

30. P. Cumming, "Corporate Law Reform and Canadian Not-For-Profit Corporations" (1974) 1 The Philanthropist 10 at 37.

31. *Re Windsor Medical Services Inc.* [1971] 2 O.R. 141 (High Ct. Justice).

32. Baz Edmeades, "Formulating a Strategy for the Reform of Nonprofit Corporation Law - An Alberta Perspective" [1984] 22 Alberta L. Rev. (3) 417 at 444.

33. Nonprofit Corporation Law, West's Ann. Cal. Corp. Code, 1982, s.s. 7332 and 7411.

34. *Supra* n. 11.

35. *Supra* n. 7 at s.42.

36. *Supra* n. 30.

37. *Id.* at 40.

38. D.W.M. Waters, Law of Trusts in Canada (2nd ed. 1984) at 604 - 610.

39. Re Enderton [1954] 4 D.L.R. (Man. Q.B.) in which certain property of a charitable corporation whose charter was revoked passed to the Crown as bona vacantia.

40. Supra n. 38 at 612 and 615 - 616.

2. The Right to Incorporate

41. F.W. Wegenast, Canadian Companies (1931) 17. See also Bonanza Creek Mining Co. Ltd. v. R. [1916] 1 A.C. 566; Poizer v. Ward [1947] 2 W.W.R. 193; Re Cole's Sporting Goods Ltd. [1965] 2 O.R. 243.

42. Gower, Principles of Modern Company Law (1979) 23.

43. P.H.J.H. Gosden, Self-Help: Voluntary Associations in the 19th Century (1973) 14.

44. Id. at 90.

The main legal privileges which registered friendly societies enjoyed during the latter part of the nineteenth century had come to include:

(1) the right to hold land and other property in the names of trustees

(2) while the only remedy open to an unregistered society against fraud was confined to larceny or embezzlement, a registered society had a remedy on summary conviction whenever any person:

  (a) obtained possession of any of its property, by false representation or imposition

  (b) having possession of any of its property, withheld or misapplied it

  (c) wilfully applied any part of such property to purposes other than those expressed by the rules

(3) priority for any claim a friendly society might have on the assets of its officers if they became bankrupt

(4) removal of untraceable or lunatic trustees by simple direction of the Chief Registrar instead of by application to the high court

(5) freedom from stamp duties

(6) ability for members of societies to insure the lives of their wives and children without having an insurable interest in their lives

(7) the right of members of societies to dispose of sums up to £100 payable on their death by the society by written nomination without a will; where there was no nomination, the society's trustees might distribute without letters of administration.

45. (1846) 9 & 10 Vict. c.27.

46. *Id*. and (1875) 38 & 39 Vict. c.60.

47. An Ordinance Respecting Mechanics' and Literary Institutes, N.W.T.O. 1890, No. 17; An Ordinance Respecting Benevolent and Other Societies, N.W.T.O. 1891-92, No. 19.

48. S.A. 1924, c.11, s.8(1).

49. R.S.A. 1980, c.S-18, s.7.

50. 1844 (U.K.) 7 & 8 Vict. c.110. See also *supra* n. 32 at 421.

51. Companies Act, R.S.A. 1980, c.C-20, s.15(1). The requirements are more stringent for "clubs", and the Registrar is given a discretion with respect to social clubs. See ss.15(2) and 15(3).

52. *Supra* n. 29 at s.8.

53. *Id.* at ss.1, 3, 8 and 9.

54. Institute of Law Research and Reform, *Proposals for a New Alberta Incorporated Associations Act*, Report No. 49 (March 1987) 30 & 31.

55. *Supra* n. 30 at 21.

56. *Id*.

57. *Id*.

58. New York Not-For-Profit Corporation Law, Book 37, McKinney's Consolidated Laws of N.Y. Anno., s.404(a).

59. R.S. Pasley, "Organization and Operation of Non-Profit Corporations - Some General Considerations" (1970) 19 Clev. St. L. Rev. 239 at 243.

60. Supra n. 30 at 21; Note, "Permissible Purposes for Nonprofit Corporations" (1951) 51 Columbia L. Rev. 889 at 897; Peter A. Cumming, Proposals for a New Not-For-Profit Corporations Law For Canada Volume I (1974) at 13.

61. Supra n. 30 at 22.

62. Id.

63. Supra n. 51.

64. Peter A. Cumming, Proposals for a New Not-For-profit Corporations Law for Canada Volume I (1974) at 12.

65. Id.

66. For a more complete discussion of this point see supra n. 32.

3. Permissible Purposes

67. Dr. Lujo Bretano at lxxx; see also Chapter II, Part 1., n. 3.

68. Legislation governing friendly societies was introduced with Rose's Act in 1793, 33 Geo. III c.54. There were nineteen statutes which amended and added to Rose's Act until the Friendly Societies Act of 1875, 38 & 39 Vict. c.60.

69. Note, "Permissible Purposes for Nonprofit Corporations" (1951) 51 Columbia L. Rev. 889 at 894; see also Chapter II, Part 1. n. 31.

70. Supra n. 47.

71. S.A. 1924, c.11, s.4(1).

72. R.S.A. 1980, c.S-18, s.3(1).

73. See Chapter II, Part 3, n. 127.

74. Supra n. 54 at 31.

75. Supra n. 54 at 30.

76. S.A. 1981, c.B-15.

77. Supra n. 54 at 30 & 31.

78. Supra n. 69.

79 Supra n. 30 at 23.

80. Supra n. 69 at 891.

81. Supra n. 1 at 510.

82. Supra n. 1 at 526; Supra n. 30 at 25; Robert S. Lesher, "The Non-Profit Corporation - A Neglected Stepchild Comes of Age" (1967) The Business Lawyer 951 at 955.

83. R.S.C. 1970, c.C-32, as am. by c.10 (1st Suppl.).

84. Supra n. 64 at 19.

85. Supra n. 64 at 19.

86. Note, "Nonprofit Corporations - Definitions" (1963) 17 Vanderbilt L. Rev. 336.

87. Supra n. 64 at 19.

88. Supra n. 86 at 339.

89. S.C. 1971, c.6.

90. R.S.A. 1980, c.C-24.

91. Supra n. 64 at 20.

92. Supra n. 64 at 21.

93. Supra n. 30 at 26; Supra n. 69 at 897.

94. Id.

95. Supra n. 1 at 513.

96. Supra n. 69 at 891 and 892.

97. Supra n. 1 at 514.

98. Supra n. 30 at 23.

99. Supra n. 69 at 894. Note the similarities and differences between the list of permissable purposes in s.154(1) of the Canada Corporations Act and s.3(1) of the Alberta's Societies Act:

s.154(1)	...objects...of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, or sporting character...
s.3(1)	...benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting...

100. Supra n. 64 at 19; supra n. 86 at 337.

101. An example of an outmoded purpose was found in a 1955 Tennessee Statute which permitted the incorporation of societies for the organization and support of battlegrounds. Tenn. Code. Ann. 48 - 1101 (1955).

102. Supra n. 58.

103. Supra n. 59 at 243; Note, "Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organizations in New York and Pennsylvania" (1955) 55 Columbia L. Rev. 380; William H. Wood, "What are Improper Corporate Purposes for Nonprofit Corporations?" (1939-40) 44 Dickinson L. Rev. 264 at 267.

104. Matter of Bronx County Cadet Corps, Inc. (1963) 40 Misc. 2d. 3, 242 N.Y.S. 2d. 669 (S.C. Bronx Cty).

105. Sidney Gelb's Chapter for Cancer Research, Inc. (1959) 17 Misc. 2d. 599, 187 N.Y.S. 2d. 184 (S.C. Queen's Cty.).

106. Application of Council of Orthodox Rabbis, Inc. (1958) 10 Misc. 2d. 62, 171 N.Y.S. 2d. 664 (S.C.N.Y. Cty.).

107. R.S.A. 1980, c.S-18, s.7.

108. See Chapter II, Part 2, and Chapter II, n. 63.

109. Note, "Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organizations in New York and Pennsylvania" (1955) 55 Columbia L. Rev. 380 at 381-2.

110. Supra n. 107 at s.6(1).

111. Supra n. 109 at 394.

112. See Chapter III, Part 2.

113. Supra n. 1 at 519 - 527.

114. For example, some nonprofit organizations are tax exempt under ss.149(1) and 149.1 of the Income Tax Act, S.C. 1970-71-72, c.63, as amended, and some also receive government grants and subsidies by virtue of their nonprofit status.

115. Income Tax Act, S.C. 1970-71-72, c.64 as am., ss.149(1)(j) and (i), and s.149.1.

116. Eligibility for government grants and subsidies can be determined on the basis of corporate status, contents of by-laws, and compliance with licensing requirements, for example.

117. Supra n. 1 at 522.

118. Henry B. Hansmann, "The Role of Nonprofit Enterprise" [1980] Yale L.J. 835 at 843 - 845.

119. Id. at 845.

120. Supra n. 1 at 523-4

121. Id. at 524.

122. Id.

123. Supra n. 118 at 875-6; Supra n. 1 at 524.

124. Supra n. 1 at 524.

125. Id. at 520-22.

126. Id.

127. See Chapter II, Part 1, n. 31.

4. Directors' Duties

128. Bruce Welling, Corporate Law in Canada (1984) 327 - 328. Professor Welling also points out that the "reformed Canadian statutes make virtually all the general rules regulating corporate management applicable to both directors and officers." Until this time the rules governing directors' duties did not consider other corporate officials, although there was some movement to include senior corporate officers in Canadian Aero

Service Ltd. v. O'Malley et al. (1974) 40 D.L.R. (3d) 371, [1974] S.C.R. 592. If enacted, Bill 54, the Volunteer Incorporations Act, will also include officers with directors under the rules regarding disclosure requirements, fiduciary duties, and the duties of care, diligence, and skill.

129. Canada Business Corporations Act, S.C. 1974-75, c.33,; Alberta Business Corporations Act, S.A. 1981, c.B-15; Manitoba Corporations Act, S.M. 1976, c.40; Saskatchewan Business Corporations Act, R.S.S. 1978, c.B-10; British Columbia Company Act, R.S.B.C. 1979, c.59; New Brunswick Business Corporations Act, S.N.B. 1981, c.B-9.1; Ontario Business Corporations Act, 1982, S.O. 1982, c.4.

130. Society Act, R.S.B.C. 1979, c.390; Non-Profit Corporations Act, R.S.S. 1979, c.N-4.1; Corporations Act, S.M. 1976, c.40, Part XXI Community Development Corporations, Part XXII Corporations Without Share Capital.

131. Agricultural Societies Act, R.S.A. 1980, c.A-12; Cemetery Companies Act, R.S.A. 1980, c.C-3; Companies Act, R.S.A. 1980, c.C-20; Religious Societies' Lands Act, R.S.A. 1980, c.R-14; Societies Act, R.S.A. 1980, c.S-18; Women's Institute Act, R.S.A. 1980, c.W-13.

132. Under both the Agricultural Societies Act, R.S.A. 1980, c.A-12, s.27(2), and the Women's Institute Act, R.S.A. 1980, c.W-13, s.33, this power is not to be exercised unless the directors have been authorized to do so at a special meeting. Under the Cemeteries Act, R.S.A. 1980, c.C-3, s.22, the disposition of a cemetery by the directors must be authorized by the Registrar of Corporations. The Religious Societies' Lands Act, R.S.A. 1980, c.R-14, s.11, requires that an incorporated church or religious denomination must pass a declaration of incorporation which sets out the rules with respect to how and by whom church property is to be dealt with.

133. Societies Act, R.S.A. 1980, c.S-18, s.4.

134. Supra n. 128 at 374 - 375

135. Hadden, T., Forbes, R.E. & Simmonds, R.L. Canadian Business Organization Law (1984) 194.

136. In the Matter of the Toronto Humane Society, Public Trustee v. The Toronto Humane Society and T. Robert Hambley Ont. Sup. Ct. No. RE324/87 June 5, 1987 (unreported). See also Hodgson & McNeely, "Trusteeship and the Charitable Corporation" (1984) IV No. 2 The

Philanthropist 26, for a discussion of the cases that characterize directors of charitable corporations as trustees. The authors conclude that they would likely not be found to be trustees within the "unqualified legal meaning of that word."

137. Wainberg and Wainberg, *Duties and Responsibilities of Directors in Canada* (5th ed. 1984) 6, where the authors canvass the line of cases which characterize directors as agents.

138. *Supra* n. 135 at 195. See also Bromley and MacRae, "Duties and Liabilities of Directors" in (1987), The Continuing Legal Education Society of British Columbia, *Charitable and Non-Profit Organizations* 3.1.01.

139. *Supra* n. 30 at 32.

140. *Id*.

141. *Supra* n. 1 at 568.

142. *Id*.

143. James J. Fishman, "Standards of Conduct for Directors of Nonprofit Corporations" (1987) 7 Pace L. Rev. 389 at 461.

144. *Supra* n. 30 at 32. Similar arguments were made for and against the increased regulation of Friendly Societies at the time when the Friendly Societies Act of 1875 was passed (38 & 39 Vict. c.60). "Any further extension of [State supervision] they think would prove a failure from the fact that the management of these societies is mostly in the hands of men who receive no remuneration; who, moreover, have only reluctantly undertaken the labour imposed upon them by the Act of 1875, and who would, therefore resent any attempt to burden them still more...An opposite view is shared by those...who demand...that the scope of State action should be enlarged, and regard such an extension of authority as the necessary guarantee for the protection of inexperienced members against reckless or improper management, and the enlargement of delusive hopes." J.M. Baernreither, *English Associations of Working Men* (1889) 334 - 335.

145. *Id*.

146. *Id*.

147. Thomas H. Boyd, "A Call to Reform the Duties of Directors Under State Not-For-Profit Corporation Statutes" (1987) 72 Iowa L.Rev. 725.

148. Id. at 734.

149. Business Corporations Act, S.A. 1981, c.B-15, s.117(1)(b).

150. Supra n. 147 at 744.

151. Supra n. 143 at 414.

152. Id.

153. Id. at 414.

154. Id. at 393.

155. Id. at 398.

156. Id.

157. Id.

158. Id.

159. Supra n. 54 at 52 - 56.

160. Id. at 52.

161. Id. at 130. See also Business Corporations Act, S.A. 1981, c.B-15, s.117(1)(a) and Bill 54, Volunteer Incorporations Act, s.51(1)(a).

162. Business Corporations Act, S.A. 1981, c.B-15, s.117(1)(b).

163. Supra n. 54 at 52 & 53.

164. Id.

165. In re City Equitable Fire Insurance Company, Limited [1925] 1 Ch. 407.

166. Supra n. 137 at 23 and 53 - 58.

167. Supra n. 143 at 397.

168. Id. at 396 - 397.

169. Supra n. 162.

170. Supra n. 128 at 332.

171. Supra n. 54 at 53.

172. Id. at 52. It is interesting to note that while the Institute of Law Research and Reform and Peter Cumming both concluded that directors' duties should be the same for nonprofit and for-profit directors, Cumming did not conclude that a special consideration of the voluntary nature of most nonprofit directorships was necessary, while the Institute of Law Research and Reform concluded that such a special consideration was necessary and would be accommodated by a provision identical to that recommended by Cumming.

173. Supra n. 29 at s.50; Business Corporations Act, S.A. 1981, c.B-15, s.115.

174. Companies Act, R.S.A. 1980, c.C-20.

175. (1854) 1 Macq 461 (Scot., H.L.).

176. North-West Transportation Co. Ltd. v. Beatty (1887) 12 A.C. 589.

177. Supra n. 128 at 430.

178. Supra n. 33.

179. Supra n. 128 at 430.

180. Supra n. 54 at 52.

181. Supra n. 28 at s.50.

182. Id. at s.52(1).

183. Id. at s.52(1)(a).

184. Id. at s.52(1)(b).

185. Id. at s.52(2).

186. Id. at s.52(3)(a).

187. Id. at s.52(3)(b) and s.52(1)(a).

188. Id. at s.52(3)(b) and s.52(1)(b).

189. Id. at s.52(3)(c).

190. Supra n. 128 at 313.

191. Supra n. 159 at 52.

192. Supra n. 29 at s.52(4).

193. Id.

194. Supra n. 128 at 313.

195. Supra n. 29 at s.44(5)(c).

5. The Rights of Members

196. H.A. Smith, The Law of Associations (1979) Reprint of the Edition Oxford 1914) 18 & 19. See also Jean Warburton, Unincorporated Associations: Law and Practice (1986) 73.

5(a) Membership: Admission and Termination

(i) Admission

197. Agricultural Societies Act, R.S.A. 1980, c.A-12, s.8; Women's Institute Act, R.S.A. 1980, c.W-13, ss. 9 & 13; Cemetery Companies Act, R.S.A. 1980, c.C-3, ss. 12 & 14; Companies Act, R.S.A. 1980, c.C-20, s.1(1).

198. Societies Act, R.S.A. 1980, c.S-18, s.5(4)(a); Religious Societies' Land Act, R.S.A. 1980, c.R-14, s.11(2).

199. For example, section 5(4)(a) of the Societies Act, R.S.A. 1980, c.S-18 provides that the terms of admission of members shall be set out in the by-laws. The Act also provides in section 16 that minors can be members and must pay fees and otherwise comply with the rules of a society as if they were adults.

200. R.S.A. 1980, c.C-3, s.12.

201. Individual's Rights Protection Act, R.S.A. 1980, c.I-2, s.3.

202. Id. at s.10.

203. Walter S. Tarnopolsky, Discrimination and the Law (1985) 11 - 32.

204. (1972) Alberta.

205. Alberta Bill of Rights, R.S.A. 1980, c.A-16.

206. (1975) 57 D.L.R. (3d) 746.

207. School Act, (then) R.S.A. 1970, c.329, ss. 142 & 143.

208. R.S.A. 1980, c.I-2.

209. Supra n. 206 at 749 - 50.

210. (1976) 72 D.L.R. (3d) 330.

211. Supra n. 203 at 11 - 33.

212. (1980) 1 C.H.R.R. D/25.

213. Supra n. 186 Cumulative Supplement at 50 - 51.

214. (1984) 8 C.H.R.R. D/3668.

215. (1986) 8 C.H.R.R. D/3746.

216. R.S.A. 1980, c.S-3.

217. Supra n. 203 at 11 - 49 to 11 - 50.

218. Charter v. Race Relations Board [1973] 1 All E.R. 512; Docker's Labour Club v. Race Relations Board [1974] 3 All E.R. 592.

219. Docker's Labour Club v. Race Relations Board [1974] 3 All E.R. 592 at 595 per Lord Reid as cited in Supra n. 186 at 11 - 17.

220. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11.

221. [1987] 1 W.W.R. 577 at 593.

222. Id. at 598.

223. (1986) 26 D.L.R. (4th) 728.

224. S.O. 1981, c.53, s.19(2).

225. Supra n. 221 at 600.

226. Id. at 601.

ii Termination

227. R.S.A. 1980, c.S-18, s.5(4)(b).

228. Jean Warburton, Unincorporated Associations: Law and Practice (1986) 76.

229. Id.

230. Id. at 75.

231. [1975] 4 W.W.R. 449 (Alberta Supreme Court, A.D.).

232. Id. at 451 - 52.

233. (1984) 47 N.F.L.D. and P.E.I.R. 212.

234. (1982) 38 B.C.L.R. 230.

235. Id. at 238.

236. D.P. Jones, A.S. de Villars, Principles of Administrative Law (1985) 47.

237. Id. at 3

238. Id. at 5.

239. (1977) 4 A.R. 573.

240. Supra n. 236 at 177.

241. Id. The five cases which have extended the scope of judicial review in Canada are discussed at length at pp. 162 - 178 in Jones' and de Villars' book under the heading "The Development of the Duty to be Fair in Canada." The cases are Nicholson v. Haldimand Norfolk Police Commissioners Board [1979] 1 S.C.R. 311; Campeau Corporation v. Calgary (No. 1) (1980) 7 Alta. L.R. (2d) 302; Harvie v. Calgary Regional Planning Commission (1978) 8 Alta. L.R. (2d) 166; McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District No. 1 [1979] 4 W.W.R. 725; Martineau v. Matsqui Institution Disciplinary Board (No. 2) [1980] 1 S.C.R. 602.

242. Supra n. 236 at 177.

243. Supra n. 54 at 47.

244. Supra n. 29.

245. S.S. 1979, c.N-4.1, s.116. This Act is based on Bill C-10, the proposed Canada Not-Profit Corporations Act. (See Chapter II, p. 39 and n. 144).

246. *Id*. at ss. 117 & 215.

247. (1987) 52 Sask. R. 126.

248. *Id*. at 139.

5(b) Control of the Organization

249. *Supra* n. 41 at 316 at which Wegenast asks "Is there any limit to this power of the majority to control the company? Is it absolutely within the power of the majority in furtherance of its own selfish ends to sacrifice the interests of the minority? Has the minority no rights which it can assert against the company?"

250. *Supra* n. 128 at 496 - 497.

251. *Supra* n. 128 at 497.

252. *Supra* n. 54 at 60 - 66.

253. *Supra* n. 228 at 83.

254. *Supra* n. 128 at 456; *Supra* n. 41 at 315.

255. R.S.A. 1980, c.S-18, s.5(4)(c).

256. R.S.A. 1980, c.W-13, s.16.

257. R.SA. 1980, c.A-12, s.10(3).

258. R.S.A. 1980, c.C-3, s.17.

259. R.S.A. 1980, c.R-14, ss.4(3), 9(1) & 11(2).

260. R.S.A. 1980, c.C-20, s.151(1)(f).

261. *Supra* n. 128 at 445.

262. *Id*.

263. *Id*.

264. R.S.A. 1980, c.S-18, s.5(4)(d).

265. R.S.A. 1980, c.C-20, Table A, ss.62-67.

266. R.S.A. 1980, c.W-13, Constitution of the Alberta Women's Institutes, Article VIII.

267. R.S.A. 1980, c.A-12, s.10.

268. R.S.A. 1980, c.C-3, s.16.

269. R.S.A. 1980, c.R-14, s.11(2)(c).

270. Id. at s.15.

271. Supra n. 128 at 447.

272. Societies Act, R.S.A. 1980, c.S-18, s.21; Companies Act, R.S.A. 1980, c.C-20, s.149(1); Cemetery Companies Act, R.S.A. 1980, c.C-3, s.16; Agricultural Societies Act, R.S.A. 1980, c.A-12, ss.6 & 17; Women's Institute Act, R.S.A. 1980, c.W-13, ss.12 & 21; the Religious Societies' Land Act does not contain a provision regarding the annual general meeting, although it could be provided for in the constitution or by-laws of a religious society.

273. Supra n. 42 at 528.

274. Supra n. 42 at 529.

275. Societies Act, R.S.A. 1980, c.S-18, s.5(4)(c); Companies Act, R.S.A. 1980, c.C-20, s.150(1); the Cemetery Companies Act does not specifically provide for special general meetings nor does the Religious Societies' Land Act, although the latter Act provides that the "majority of any properly constituted meeting shall be deemed to be the majority of the congregation." (R.S.A. 1980, c.R-14, s.13(3)) thereby acknowledging that meetings will be held, presumably pursuant to a religious societies' by-laws or the rules of the congregation.

276. Women's Institute Act, R.S.A. 1980, c.W-13,s.23; Agricultural Societies Act, R.S.A. 1980, c.A-12, s.22. The Director of Agricultural Societies, under s.34, may, "on 30 days' written notice to the society, order the society to hold a special meeting of the members of the society or of the board of directors" to inform them of a matter about which the Director is of the opinion they should be informed.

277. R.S.A. 1980, c.C-20, s.150(1).

278. Id. at s.150(3).

279. Supra n. 42 at 529.

280. Id.

281. Supra n. 42 at 544.

282. Societies Act, R.S.A. 1980, c.S-18, s.1(d); Companies Act, R.S.A. 1980, c.C-20, s.1(y). The other nonprofit statutes in Alberta either do not specifically provide for or refer to resolutions, e.g. Cemetery Companies Act, R.S.A. 1980, c.C-3; Agricultural Societies Act, R.S.A. 1980, c.A-12; or refer to resolutions but do not provide for different types, e.g. Women's Institute Act, R.S.A. 1980, c.W-13; Religious Societies' Land Act, R.S.A., 1080, c.R-14.

283. R.S.A. 1980, c.C-20, ss.36(1), 55(1) & (2), 32(1), & 175.

284. R.S.A. 1980, c.S-18, ss.11, 12, & 29.

285. Supra n. 42 at 552.

286. Id. at 554.

287. Id. at 555.

288. Id.

289. Supra n. 128 at 458.

290. Id. at 466.

291. Supra n. 228 at 83.

5(c) Members' Remedies

292. R.S.A. 1980, c.S-18, s.18.

293. R.S.A. 1980, c.A-43.

294. R.S.A. 1980, c.A-12, s.35.

295. Id.

296. Id. at s.36.

297. Id. at s.37.

298. R.S.A. 1980, c.C-20, s.151(1)(c).

299. Id. at s.34(5).

300. Id. at s.177.

301. Supra n. 54 at 60 - 66.

302. Supra n. 29 at s.94.

303. R.S.A. 1980, c.C-20, s.177.

304. Supra n. 294 & 295.

305. Supra n. 128 at 555 et seq.

306. S.A. 1981, c.B-15, Part 13.

307. Id. at 259.

308. Supra n. 29 at Part 13, and s.154.

309. Professor Welling explains in Corporate Law in Canada (1984) 517 - 19, that the term "derivative action" has come to be used in Canada in popular parlance to describe statutory representative actions. He feels that the term is American in origin and is properly used to describe the complex set of rules whereby a shareholder may sue on behalf of his corporation in American courts. The shareholder "derives" his right to sue from the corporate entity. In Canada the shareholder's right to sue on behalf of the corporation is actually "derived" from the statute, hence the proper term, "statutory representative action."

310. S.A. 1981, c.B-15, s.232.

311. Supra n. 54 at 62 - 64. See also supra n. 1 at 608-615 where Hansmann discusses the rights of private parties in several American jurisdictions to commence legal proceedings to rectify improper management of nonprofit organizations.

312. Supra n. 128 at 504.

313. Supra n. 29 at s. 126(b).

314. S.A. 1981, c.B-15, s.240.

315. Supra n. 54 at 64 - 65.

316. Supra n. 29 at s. 135.

317. Supra n. 54 at 64.

318. Supra n. 128 at 521.

319. S.A. 1981, c.B-15, s. 234.

320. Supra n. 54 at 63 - 64.

321. S.S. 1979, c.N-4.1, s.215

322. (1986) 47 Sask.R. 229.

323. Id. at 235.

324. Supra n. 247.

325. Supra n. 247 at 139.

326. Supra n. 54 at 64.

327. S.A. 1981, c.B-15, s.184(1).

328. Id. at s.184(2).

329. Supra n. 54 at 66.

330. Id. at 65.

331. Id.

332. Institute of Law Research and Reform, "Draft Non-Profit Corporations Issues Paper" (September 29, 1986) 34.

333. Supra n. 54 at 66.

334. Supra n. 128 at 451.

CHAPTER IV - RECOMMENDATIONS FOR THE STATUTORY TREATMENT OF NONPROFIT ORGANIZATIONS

The present statutory regime for Alberta's incorporated nonprofit organizations consists of a collection of unrelated statutes which govern every conceivable type of nonprofit organization, including service organizations, nonprofit companies, community organizations, social and recreational clubs, charitable organizations, agricultural societies, women's institutes, and churches and other religious organizations. This system has functioned for over 3/4 of a century and could likely continue functioning for several more years. However, because of the enactment of the Business Corporations Act[1] in 1981 which left Alberta's approximately 600 nonprofit companies as the only entities to be governed by the Companies Act,[2] the opportunity existed to modernize and standardize the statutory treatment of nonprofit organizations in Alberta. The following discussion examines four general statutory approaches to nonprofit organizations, the appropriateness of adapting business corporation law principles to nonprofit organizations, and several recommendations for the specific statutory treatment of nonprofit organizations.

1. General Statutory Approaches to Nonprofit Organization Legislation

There are four approaches to nonprofit organization legislation which could be followed in Alberta: the status quo could be maintained; Bill 54[3] could be enacted; a general statute like Bill 54 could be enacted and bridged to the specialized statutes; or one comprehensive statute could be enacted to apply to every type of nonprofit organization, with the attendant repeal of the specialized nonprofit statutes. These four options will be discussed below.

a) The Status Quo

The status quo could easily be maintained - the statutes are familiar, the administrative machinery is functioning, and Alberta's 15,000 nonprofit organizations appear to be coping within an imperfect system. However, notwithstanding the apparent tolerance of the current system, it is submitted that the opportunity to reform Alberta's legislative approach to nonprofit organizations should not be ignored. The existing legislation is obsolete, inconsistent, incomplete, and in certain circumstances inappropriate. For example, the Companies Act was drafted for business corporations with nonprofit companies added later. Although it can be argued that many of the concepts which apply to business corporations are equally applicable to nonprofit organizations, it should be noted that the Companies Act does not include the more recent reforms that have occurred with respect to business corporation law. In addition, while some business corporation law concepts may be appropriate and necessary for nonprofit organizations, not all are. It is therefore not particularly useful to have nonprofit companies in a statute drafted primarily for business corporations. It is submitted that they should instead be housed in a statute which, although it contains concepts borrowed from the law of business corporations, is drafted specifically for nonprofit organizations. That is, they should be governed by a statute with a consistent and coherent philosophy for incorporated nonprofit entities, and which at the same time takes advantage of the reforms enacted in 1981 in the Business Corporations Act.

The Societies Act[4] also has shortcomings. While drafted specifically for societies, it suffers from incompleteness. It does not address such issues as directors' duties and the rights and remedies of members. It is also limited in other areas, including members' proceedings, financial affairs, fundamental changes, and liquidation and dissolution. Although it can be argued that the present Societies Act is brief and uncomplicated, and therefore "user-friendly", it is submitted that a more comprehensive statute would be more useful. Under the present statute there is the potential for many issues to arise which would not be dealt with by the Act, in which case resort must be had to a given society's by-laws. If the by-laws are also silent on the issue, the society is left with little recourse. A more comprehensive statute would decrease the potential for this sort of problem, by providing in more detail for a broader range of issues. For example, the Societies Act requires that a society's by-laws contain provisions regarding the expulsion of members. If a given society's by-laws provide only that members will be expelled upon failure to pay membership dues for two consecutive years, the society will have few options when it desires to expel a fully paid-up member for conduct which is detrimental to the operation and reputation of the society.

Like the Societies Act, Alberta's specialized nonprofit statutes[5] are incomplete in many respects. Their treatment of directors' powers and duties, and members' rights and remedies in particular, is limited or non-existent. While it can again be argued that these statutes are brief and uncomplicated, it must also be recognized that brevity and simplicity are not the most significant statutory characteristics. A board of directors of a society faced with a troublesome member would gain little solace in the simplicity of their governing statute upon discovering that they have no recourse because of a statute silent on the issue of membership termination, and equally silent by-laws.

For these reasons, it is not recommended that the existing statutory regime for Alberta's incorporated nonprofit organizations be maintained. The opportunity to modernize is one of which advantage should be taken. The limitations of the existing legislation are known, and much can be learned from the experiences of other jurisdictions which have already enacted updated nonprofit organization legislation, as well as from those which have reformed their business corporation statutes.

b) Bill 54, the Proposed Volunteer Incorporations Act

A second alternative is the enactment of Bill 54, the proposed Volunteer Incorporations Act.[6] This would result in the repeal of the Societies Act and the Companies Act, and would continue all existing societies and nonprofit companies under the new statute as incorporated associations. None of the specialized nonprofit statutes would be affected, it having been decided to defer consideration of them until it has been determined whether Bill 54 can be adapted to meet the needs of the specialized nonprofit organizations.[7]

The enactment of Bill 54 would reform the law for more than 80% of Alberta's incorporated nonprofit organizations.[8] It would modernize and standardize the law for all of Alberta's societies and nonprofit companies, leaving approximately 2,300 specialized nonprofit organizations under the regulation of the existing specialized nonprofit statutes. This would be a significant accomplishment in terms of the reform of nonprofit organization law. However, it is submitted that it would be more significant if the reforms were to encompass all of Alberta's nonprofit organizations. The determination of the appropriateness of Bill 54 for the specialized nonprofits should not be deferred for two reasons. First, if it is agreed that the opportunity to reform Alberta's nonprofit organization law should be utilized, then it should also be agreed that that reform should include all of Alberta's nonprofit organization laws, not just a segment, albeit a significant segment, of those laws. The task of reforming the "leftover" segment would not be onerous in light of the Institute's extensive study of the whole nonprofit sector in its preparation of what is now Bill 54, as well as the major areas of commonality between all nonprofit organizations, notwithstanding their diversity in purposes. Second, given the length of time it has taken to develop the proposed reforms in the form of Bill 54, proposals which will not be reintroduced in the Legislature in the Spring of 1988 but which will instead be studied by a government appointed Task Force,[9] it is unlikely that the specialized nonprofit statutes will be reformed in the near future. It should therefore be concluded that the specialized nonprofit statutes should have been included in the present process of reform. This could be accomplished in two ways: first, Bill 54 or a similar general nonprofit incorporation statute could be enacted and bridged to the specialized statutes, or second, a comprehensive statute could be enacted which would apply to every type of nonprofit organization in Alberta, general and specialized. The following discussion examines these latter two alternatives.

c) Bridging

A bridging approach was suggested by Robert Lesher, a New York lawyer who in 1967 wrote "The Non-Profit Corporation - A Neglected Stepchild Comes of Age"[10] Lesher proposed that special nonprofit corporation statutes could be "bridged" to a general nonprofit corporation statute in the same way that special corporation laws in New York with respect to insurance, railways, transportation, and cooperatives were bridged to New York's Business Corporation Law.[11] Lesher suggested that this would result in flexibility which would allow for the creation of new types of nonprofit corporations "without having to restate the basic corporate statute in each individual case...[it] also would guarantee aagainst

[sic] inconsistencies or gaps which might develop if the general provisions are set out in the separate statutes governing each of the various types."[12] Another advantage of this approach is the maintenance of the unique identity of each type of specialized nonprofit organization.

If this approach were to be adopted in Alberta, the task of reforming the specialized nonprofit statutes would be minimal. Each statute would have to be examined in the context of the proposed general statute. If any of the provisions in the specialized statute were redundant or in conflict with the general statute a determination would have to be made as to whether it would compromise the integrity of the specialized organization to repeal the provision in question and replace it with the provision in the general statute. If it was determined that the subject-matter of the offending provision was essential to the identity of the particular specialized nonprofit organization, a further determination could be made as to whether it could be adequately dealt with in the by-laws. In the result there could be up to three choices:

(i) retain the offending provision;

(ii) repeal the offending provision and adopt the provision in the general statute; or

(iii) repeal the offending provision, provide for it in the by-laws, and adopt the provision in the general

> statute if it is general enough so as not to cause any possibility of conflict.

One example involves the formation of one member organizations. Bill 54 would permit the formation of an incorporated association with only one person,[13] while the Cemetery Companies Act requires a minimum of 7 persons to incorporate a cemetery company.[14] A determination would therefore have to be made as to whether it would be necessary to retain the specific incorporation requirements of the Cemetery Companies Act. Is there a compelling policy reason for requiring at least 7 incorporators to form a cemetery company? Or is the requirement simply a means of ensuring that cemetery plots do not proliferate inappropriately throughout the province, in which case other measures, like zoning regulations, could be employed to control their establishment? A second example involves the formation of a nonprofit organization with a capital stock divided into shares. Under Bill 54 this is permitted under section 34 which is bridged to several sections in the Business Corporations Act.[15] Cemetery companies under the Cemetery Companies Act also have a capital stock divided into shares.[16] In addition to the general provision with respect to shares, there are also some specific provisions relating to the payment of interest on the paid-up stock which is not represented by land in the cemetery.[17] The former general provisions are arguably of the type which could be repealed and replaced by the provisions in Bill 54, since they are of a general nature. However, the latter provisions are unique among the nonprofit statutes and would have to be examined to determine whether they are essential to the operation of cemetery companies. The provisions in question treat the shareholders' payment for shares as loans to the company to be used for the purchase of land for a cemetery. Interest of up to 8% per year may be paid on the shareholders' paid-up stock not represented by land in the cemetery, or the company may repay the shareholders the amount of paid up stock held by them and not represented by land in the cemetery.[18] The company's purchase of its own shares would be possible under Bill 54 as section 34 of the bill is bridged to Part 5 of the Business Corporations Act which permits such a transaction.[19] However, the payment of interest on paid-up stock not represented by land in the cemetery would not be possible under Bill 54. Are there then policy reasons which would justify the continuation of the practice? Since a cemetery company is not permitted to pay dividends or profits to its members, the provision for the payment of interest is presumably not intended as an incentive to invest in cemetery companies. It is arguably intended instead merely to treat members fairly when they are required to pay a specified amount for shares, which will in turn be used to purchase land at some future date for a price as yet undetermined. It is this element of potential overpayment for which the shareholder is being compensated through either the payment of interest or the company's purchase of its shares. It is arguable that the duality of this compensation is redundant and could be adequately accomplished with the single component of the share re-purchase. This would eliminate the need for any provisions regarding shareholding in the Cemetery Companies Act if it were bridged to Bill 54. However, it is also arguable that such a move would not compensate those shareholders who do not wish to be repaid, but would prefer to leave their money in the company for future purchases as necessary. But if the whole issue is considered from the perspective of the distribution constraint it must be agreed that the payment of interest is in effect the distribution of income during the existence of the company, regardless of intention, and should not be allowed. In the final result it would be possible to repeal the provisions in the Cemetery Companies Act regarding shareholding and adopt general provisions like those in Bill 54.

It is submitted that the use of bridging as an approach to legislating for nonprofit organizations in Alberta would be an appropriate choice for two reasons. First, it would have the desired effect of modernizing and standardizing the law for all of Alberta's nonprofit organizations. Second, it would retain the flexibility that currently exists whereby specialized types of nonprofit organizations can be formed under their own statutes, and yet still be consistent with all other types of nonprofit organizations.

d) One Comprehensive Statute

The fourth alternative for the statutory treatment of nonprofit organizations is the enactment of one comprehensive statute for all types of nonprofit organizations. Under this scheme there would be no need for the specialized nonprofit statutes. A comprehensive statute could be drafted broadly and generally enough to allow for the formation of any type of nonprofit organization, while at the same time varying the level of regulation of the different types of organizations through the use of specialized categories within the statute. Such a scheme was adopted in California in 1980.[20] California's Nonprofit Corporation Law divides nonprofit corporations into three distinct categories according to function as well as the degree of public concern.[21] The three categories within the statute are public benefit, mutual benefit, and religious corporations. The key organizational features of the California Nonprofit Corporation Law flow from this categorization and include the following:[22]

1. The single nonprofit corporation statute is divided into four basic parts: Part 1 contains introductory

> definitions applicable selectively to Parts 2 through 4. Part 2 relates to public benefit corporations, Part 3 to mutual benefit corporations, and Part 4 to religious corporations.
>
> 2. Each of Parts 2 through 4 is essentially self-contained, governing the corporate formation, operation, reorganization, and dissolution of each type of nonprofit corporation.
> 3. Each of Parts 2 through 4 parallel the new General Corporation Law, even to the extent of using the same language.
> 4. Parts 2 through 4 are uniform on given issues where appropriate, and in most instances, are easily traced to the corresponding sections of each part.
> 5. There is a recognizable difference in degree of detailed statutory regulation between Parts 2, 3 and 4. A decreasing continuum running from the more highly controlled public benefit corporation to the less controlled mutual benefit corporation, and ending with the minimally regulated religious corporation.
> 6. Both Part 2, which deals with public benefit corporations, and Part 3, which concerns mutual benefit corporations, contain an extensive number of statutory norms that set the operating mode in the absence of applicable articles or bylaw provisions.
> 7. The special needs for each type of corporation are included in the appropriate part by tailoring the statute, either by adding another provision following the applicable uniform provision, by modifying the uniform provision or by including a new section.

William T. Fryer and David R. Haglund, two American legal commentators, have noted that this approach to nonprofit legislation has certain advantages.[23]

> The primary advantages of the new organization of the statute are that it affords the maximum benefit of a single statute, where a common approach can be used, and it minimizes the confusion and conflict brought on by the different nature of the three nonprofit groups by separating them within the statute. Each type of nonprofit corporation within one group must follow the same rules. This approach gives maximum flexibility in fashioning the law within each group. The public benefit section applies to charities. The mutual benefits section applies to social groups. The third

section, the religious corporation, applies to the church organization.

It is submitted that the type of nonprofit legislation which has been enacted in California would be appropriate in Alberta. Like pre-1980 California,[24] Alberta's nonprofit organization law is scattered through several statutes, is inconsistent, inappropriate, and obsolete, resulting in confusion, uncertainty, and ineffectiveness. The California Law Revision Commission recommended that California's "fragmented statutory scheme be discontinued" and replaced with the "new independent and self-contained nonprofit corporation law" described above.[25] They were of the opinion that this would "enable persons dealing with nonprofit corporations to have readily available and easily accessible a law that is certain in its scope and application and that deals with nonprofit corporation problems in a unified and rational manner."[26]

It could be argued that Bill 54 would accomplish this, especially if it was made to apply to all the different types of nonprofit organizations in Alberta, and that the bill is "certain", "unified", and "rational". And although it is not divided into categories, its drafters have argued that the same effect can be achieved by specific provisions which allow nonprofit organizations "to choose between a prohibition against the distribution of any property to its members at any time and a prohibition only against the distribution of income and property during the association's existence."[27] The Institute of Law Research and Reform theorized that membership or mutual benefit organizations would probably choose the latter and that charitable or public benefit organizations would probably choose the former. The distinction between the two types would be provided for in other provisions as well. For example, only organizations that receive public money would be required to file financial statements with the Registrar of Corporations.[28] In short, the Institute felt that the "case by case approach would deal adequately with the different needs of different kinds of associations."[29]

While this approach does allow nonprofit organizations to choose their own categories and the attendant degree of regulation by the Registrar of Corporations, it does not give them the "easily accessible" statute thought desirable by both the California Law Revision Commission,[30] and the Institute of Law Research and Reform. The Institute made the following comment about the use of the proposed statute by non-lawyers.[31]

> It is important that non-lawyers be able to operate the machinery of the proposed new statute: some substantial charities have ready access to legal advice, but many volunteer non-profit associations do not....It is important that the needs of legally unsophisticated

> users be continually borne in mind by those who draft the proposed statute and by those who administer it.

It is submitted that the approach adopted in Bill 54 does not adequately accommodate the needs of legally unsophisticated users. For example, because the Bill is not divided into categories, a nonprofit organization's principals will have to read through the entire statute to determine the level of regulation that they will be subjected to depending on their choice of distribution restriction and their status as a soliciting or non-soliciting organization. It is submitted that it would be more efficient if self-contained categories were used, thus enabling those who use and rely on the statute to be assured that they have ascertained all the law pertinent to their type of organization. The use of categories would also decrease the potential for confusion by eliminating the process of determining which provisions are or are not relevant to a given nonprofit organization, a skill of which many non-lawyers are likely not possessed. The categories used need not necessarily be the same as those used in the California Nonprofit Corporation Law, the terms "mutual benefit" and "public benefit" not being familiar to the nonprofit community in general in Alberta. However, the concept of the distribution constraint is familiar, and accordingly it is submitted that the choice of distribution constraint provided for in section 5 of Bill 54 would be an appropriate basis for the categorization of nonprofit organizations in Alberta. The bill could be reorganized with an initial part of general application to all nonprofit organizations, a second part of specific application to organizations which choose an income distribution restriction, and a third part of specific application to organizations which choose an income and liquidation distribution restriction.

On the basis of these considerations it is submitted that a comprehensive statute that provides for all types of nonprofit organizations with the use of self-contained categories, would be a useful and an effective statutory approach to nonprofit organizations in Alberta. It would provide a complete and consistent treatment in a format usable both by those who administer the statute, and by those who use it, be they directors, officers, members, or the general public, whether or not they are lawyers. Such a statute would pull together those provisions which would be common to all types of nonprofits, and would provide choices in the form of categories tailored to the needs of the specific types of nonprofit organizations. The result would be a statutory approach which would not inhibit the diversity which exists in the nonprofit community, but would instead acknowledge it through statutorily recognized categories.[32] Individuality would be further encouraged with the use of by-laws drafted by each nonprofit organization to suit their own roles, activities and purposes.

2. The Appropriateness of Adapting Business Corporation Law to Nonprofit Organizations

Many of the nonprofit statutes which have been enacted and recommended in Canada and the United States have borrowed concepts from the law of business corporations. For example, the Institute of Law Research and Reform recommended "that the proposed statute [Bill 54] use the basic concepts, terms, form and organization of the Business Corporations Act where, and only where, they are appropriate" for nonprofit organizations.[33] They gave the following reasons for their recommendation.[34]

> One is that the B.C.A. [Business Corporations Act] is a modern and useful source of concepts, terms and drafting, much of which is suitable for incorporated associations. The second is that conceptual and verbal similarity between the B.C.A. and the proposed statute will save time and cost for those who, being familiar with one, want to read and understand the other.

The proposed Canada Non-Profit Corporations Act[35] and Saskatchewan's Non-Profit Corporations Act,[36] which is based on the federal bill, follow the Canada Business Corporations Act[37] in certain respects. It was felt that because the C.B.C.A. (then Bill C-213) provided "the most advanced statutory business corporation law of any jurisdiction in Canada" it was appropriate to consider nonprofit corporations in the context of those laws, while at the same time recognizing the "functional distinctiveness" of nonprofit organizations from business corporations.[38] The California Law Revision Commission was also of the opinion that California's new nonprofit corporation law should follow the state's new business corporation law, for the following reasons:[39]

> There are obvious advantages to parallelism between business and nonprofit corporation laws. Persons dealing with both types of corporations will be able to adjust easily between them to the extent they are the same. Therefore, to the extent the two types of corporations have common characteristics, they should be treated uniformly. Experience and precedent developed under one law would, in appropriate cases, be most useful in construing the meaning of the other law.

While most commentators seem to agree on the wisdom of adapting business corporation principles to nonprofit organizations,[40] at least one commentator disagrees. Howard L. Oleck, Professor of Law at the Stetson University College of Law, questions the "business" characterization of nonprofit organizations and concludes that it "contradicts the concepts of altruism and voluntarism that are the essence of a truly nonprofit organization."[41] Professor Oleck expresses his view of nonprofit organizations in the following terms:[42]

> ...lawyers who think in terms of profit-oriented organization law are basically not the right people to decide what public policies, concepts, and principles

> should undergird nonprofit organization law. Almost all nonprofits basically are (or ought to be) altruistic, voluntaristic undertakings, in which the satisfactions sought are those derived from aid to charity, service to others, compassion, religious exaltation, fellowship, beauty, and other moral compensations....The principles of nonprofit organizational law should be analogized out of the guiding principles of religious, fraternal, community-service, charitable, and mutual aid groups that have illuminated civilization for many centuries...Profit-oriented business corporation representatives, inside or outside state legislatures, have not been able to make this "new" law for voluntaristic and altruistic charities and nonprofits. It is long past time to bring different thinkers and non-business people into the legal process, in efforts to develop a more reasonable, conceptually accurate law to control the nonprofit organizations and their members.

Professor Oleck's "call for reform"[43] is meritorious in its expression of the necessity for input from other than lawyers steeped in the principles of business corporation law. There are certainly many people from many walks of life who have had significant involvement with nonprofit organizations, and who could be instrumental in the development of appropriate nonprofit organization law. Alberta's Minister of Consumer and Corporate Affairs, the Honourable Elaine McCoy, obviously agrees with such an approach in having decided to appoint a Task Force to study her government's proposed nonprofit organization law from the perspective of the user. However, it is submitted that Professor Oleck's exclusion of business corporation lawyers and rejection of the "business" characterization of nonprofit organizations does nonprofit organizations a disservice. Nonprofit organizations are increasingly numerous and sophisticated. Their internal and external activities and relationships necessitate a comprehensive framework within which they can operate with certainty, as well as an appropriate level of regulation to safeguard the public interest. It is submitted that where the existing law of nonprofit organizations is incomplete and obsolete, those principles of business corporation law which can be properly adapted to the particular needs and practices of nonprofit organizations should be. For example, the directors and officers of nonprofit organizations and business corporations have the responsibility of making decisions about other people's money. Those decisions have to be made in the best interests of the incorporated entity, whether that entity is profit-oriented or purpose-motivated. It therefore follows that there should be similar considerations with respect to the duties and responsibilities of the directors and officers of business corporations and nonprofit organizations. And because business corporation law is more advanced than nonprofit organization law in the context of directors duties, it is only logical that the benefit of that experience should be adapted to nonprofit organizations. Therefore, it is submitted that to reject the principles of business corporation law simply because they evolved in the context of for-profit-oriented entities would be wasteful and counterproductive.

3. Recommendations for the Specific Statutory Treatment of Nonprofit Organizations

Regardless of the general statutory approach eventually adopted in Alberta, certain specific recommendations regarding the statutory treatment of nonprofit organizations can be made either to amend existing legislation or as provisions in new statutes. The following discussion makes several recommendations based on the examination in Chapter III of "The Corporate Nature of Nonprofit Organizations." The recommendations are made following a brief summary of the five areas discussed in Chapter III, namely the distribution constraint, the right to incorporate, permissable purposes, the duties and responsibilities of directors and officers, and the rights of members.

a) The Distribution Constraint

The most salient feature of nonprofit organizations is the distribution constraint - the restriction on the distribution of an organization's profits to its members during the existence of the organization, upon its dissolution, or both. In Alberta the Societies Act,[44] the Companies Act,[45] and the Cemetery Companies Act,[46] prohibit the distribution of income, profit or dividends during the existence of an organization, and the Religious Societies' Land Act[47] and the Agricultural Societies Act[48] prohibit the distribution of assets upon the dissolution of an organization. The Women's Institute Act[49] is silent with respect to the distribution of income, profits or assets either during the existence of an institute or upon its dissolution.

The Institute of Law Research and Reform recommended that nonprofit organizations should choose either an income distribution restriction or both an income and a liquidation distribution restriction.[50] This would mean that every type of nonprofit organization formed under Bill 54 would be prohibited from distributing income and assets during the existence of the organization, regardless of which choice was made. This is unlike the present situation in which the distribution constraint operates either exclusively during the existence of an organization or exclusively upon its dissolution. The Institute based their recommendation on "a general policy against the distribution of property and income to members of an incorporated association," and upon the view that nonprofit organizations should be required to use property and profits to further activities.[51] In making its recommendations the Institute recognized the need for certain specific exceptions to accommodate specific types of distributions which were consistent with an organization's purposes and activities.[52]

It is submitted that the recommendations made by the Institute of Law Research and Reform with respect to the distribution constraint should be adopted for all types of nonprofit organizations in Alberta for four reasons. First, the adoption of the Institute's recommendations would provide a consistent standard for all nonprofit organizations in Alberta. Second, all nonprofit organizations would be required to use their income, profits and assets to further their activities, a requirement which would more truly reflect the essential nature of nonprofit organizations. Third, the recognition of exceptions in the Institute's recommendations adequately accommodates those situations in which a nonprofit organization is legitimately required to distribute income in furtherance of its purposes and activities. And fourth, the provision of a choice of distribution constraints recognizes and accommodates the different types of nonprofit organizations, specifically, those which operate primarily for the benefit of an organization's members, and those which operate primarily for the benefit of the public.

b) The Right to Incorporate

In Alberta incorporation remains a privilege under some nonprofit organization statutes,[53] while under others it is a right which is granted upon compliance with the statutory incorporation procedures.[54] A discretionary grant of incorporation was thought desirable for two reasons.[55] First, it was seen as a way "to control the character and quality of incorporations and...thereby protect the public interest."[56] Second, it was thought to create the appearance of government sanction.[57] However, these arguments have been refuted. First, the character and quality of nonprofit organizations can be controlled, and the public interest can be protected with provisions, sanctions and penalties which serve to monitor the actual activities of operational nonprofit organizations.[58] Second, the appearance of government sanction is irrelevant. Donors respond to the existence of tax deductibility, not government sanction.[59]

The Institute of Law Research and Reform was in agreement with this position and recommended

> ...that the Registrar be obliged to issue a certificate of incorporation for an incorporated association if the proper documents and fees are delivered to him.[60]

It is submitted that the recommendation of the Institute is appropriate for Alberta's nonprofit organizations, and it is recommended that it be adopted for all nonprofit organizations in Alberta for three reasons. First, this would create consistency in the law by making incorporation a matter of right for all of Alberta's nonprofit corporations. Second, it would not jeopardize the public interest since appropriate provisions to monitor an organization's operations exist in other areas of the law and could be included in new nonprofit legislation. Third, the perception of government sanction is both irrelevant and a fiction, and hence an inappropriate rationale to use to continue the concept of discretionary incorporation.

c) Limitations on Purposes

Limitations on the purposes for which nonprofit organizations may be formed evolved statutorily as a reflection of the nonprofit organizations which they regulated.[61] Eventually the statutory purposes became the determinants of the purposes for which nonprofit organizations were permitted to be formed. In Alberta five nonprofit organization statutes limit the purposes for which nonprofit organizations may be formed under them. They are the Societies Act, the Agricultural Societies Act, the Women's Institute Act, the Cemetery Companies Act, and the Religious Societies' Land Act.[62]

There are two approaches to the concept of purposes for nonprofit organizations.[63] The functional approach is based on the activities undertaken by an organization. For example, the five Alberta statutes listed above are illustrative of the functional approach, each containing a list of the activities which can be undertaken by the organizations formed under them. The economic approach does not consider an organization's activities, but instead considers the economic relationship between an organization and its members.[64] Under the economic approach a nonprofit organization may pursue any lawful purpose as long as there is no pecuniary gain or profit to its members.

Both approaches have problems. The functional approach is problematic because of ambiguities in the language used to define the permitted purposes, inconsistencies between the various lists of permitted purposes in the statutes, societal changes which could render a list of permitted purposes outdated, and problems with the process by which an application for incorporation is accepted or rejected.[65] The economic approach is problematic also because of ambiguities in the language used to define it.

The Institute of Law Research and Reform recommended that

> ...the proposed statute not place any restriction upon the purposes for which associations may be incorporated under it...[66]

They further recommended that

> ...the proposed statute not prohibit an incorporated association from carrying on business for a profit so

> long as the association is prohibited from distributing income or property to its members during its existence.[67]

However, while the Institute was of the opinion that no limitation should be put on the purposes for which a nonprofit organization could be formed, it did recommend that the organization include a statement of purposes in its articles of incorporation and that it be required to act within the stated purposes.[68] The organization would be allowed to alter its purposes by a special resolution.[69] The Institute recommended that an organization be required to state its purposes in this way to provide protection to its members. The members would thereby be aware of the authorized sphere of activity and would be able to take necessary action if the organization began to operate for other than its stated purposes. The Institute of Law Research and Reform did not feel that the requirement for stated purposes would "bring the *ultra vires* rule in through the back door," thereby giving organizations a means of avoiding liability for acts beyond the scope of their stated purposes.[70] The Institute expressed the opinion that what is now section 16 of Bill 54 would have the same effect as section 16 of the Business Corporations Act, a provision which effectively abolishes the *ultra vires* rule by providing that an act of a corporation is not invalid merely because the corporation has acted outside its purposes.

The requirement of stated purposes may be a useful and perhaps necessary precaution in the case of nonprofit organizations which take donations from the public, give charitable tax receipts, and operate for the benefit of the public. However, it may not be necessary for nonprofit organizations which do not rely on public donations, and which operate for the benefit of members. In the latter organizations there is more direct control by the members and more direct accountability. And while it is recognized that some of the latter organizations may prefer to state their purposes, it is submitted that the requirement of a statement of purposes should not be mandatory but should be optional in those circumstances.

On this basis, it is submitted that the recommendations made by the Institute of Law Research and Reform with respect to the purposes for which nonprofit organizations may be formed are appropriate for Alberta's nonprofit organizations, for two reasons. First, historically the activities of nonprofit organization responded to the needs of the society within which they operated. They continue to do so today. As society evolves it follows that those who respond to its needs must also evolve. Therefore, if nonprofit organizations are going to continue to respond to the society around them they must not be hampered by restrictive legislation. Second, many nonprofit organizations rely upon public funding, including individual donations from members of the public, and government grants and subsidies. As well, many enjoy the benefits of tax exemption. Public funding and tax exemption combine to form a significant financial burden on society as a whole. Nonprofit organizations that carry on a business to support their activities should therefore be encouraged, not restricted, if by doing so they lessen this burden.

d) The Duties and Responsibilities of Directors and Officers

The duties and responsibilities of the directors and officers of Alberta's nonprofit organizations are determined by a combination of common law, statute law, and individual organization's by-laws, creating the potential for confusion and uncertainty. This is in marked contrast to the directors and officers of Alberta's business corporations whose duties and responsibilities are determined by the Business Corporations Act,[71] a statute which contains the reforms developed in the 1970's. These reforms were primarily an organization and codification of the existing common law, equitable, and statutory duties. They affected fiduciary duties, and the duties of care, diligence, and skill, as well as matters such as the appointment and removal of directors, disclosure, indemnification, and insurance, areas of relevance to nonprofit directors and officers also. It accordingly seemed opportune to apply the same provisions to nonprofit organizations. However it had first to be determined whether standards appropriate for directors and officers of business corporations were also appropriate for their nonprofit counterparts. It had been argued that directors and officers of nonprofit organizations should be required to meet a higher standard of care than directors and officers of business corporations.[72] First, because members of nonprofit organizations have no pecuniary interest in their organization they are more likely to leave all matters of management to the board of directors, thereby placing a greater onus on the directors to compensate for the members' lack of concern and involvement. Second, because public solicitations, contributions, and tax exemptions comprise the assets of a nonprofit organization, the assets can be characterized as being closer to trust _res_ than to business corporation capital, placing directors in the position of trustees with an attendant higher standard of care than that of directors of business corporations. It has also been argued that the standard of care should be the same for directors and officers of nonprofit organizations as it is for directors and officers of business corporations because directors and officers of nonprofit organizations are primarily volunteers who serve in their spare time out of a sense of public duty.[73] A higher standard might discourage potential directors and officers with an interest in the nonprofit sector from accepting appointments to nonprofit organizations. One commentator has argued that there should be a shifting standard of care whereby the higher trust standard would apply if a director's activities involved an organization's charitable functions or affected its tax exempt purposes, while the lower business corporation standard would apply if a director's activities were ministerial or administrative, involving the "housekeeping" functions of the organization.[74] Another argument has been made for the use of the trust standard for public benefit organizations and the business corporation standard for mutual benefit organizations.[75]

The reformers of both the federal and the Alberta nonprofit laws concluded that directors and officers of nonprofit organizations should be governed by the same standards as the directors and officers of business corporations.[76] The Institute of Law Research and Reform accordingly made the following recommendation which follows the relevant provision of Alberta's Business Corporations Act.[77]

> ...that the proposed statute require the directors (a) to act honestly and in good faith with a view to the best interests of the corporation, and (b) to exercise the standard of care, diligence or skill which a reasonable person would exercise in comparable circumstances.[78]

The Institute further recommended that nonprofit organizations be permitted to provide for the indemnification and insurance of directors and officers of nonprofit organizations in the same way as is permitted for business corporations.[79]

> We recommend...that the proposed statute permit an incorporated association
>
> (i) to indemnify a director against liabilities incurred by him as a director other than liabilities to the association itself, and
>
> (ii) that it permit the association to obtain insurance for a director against liabilities incurred as a director other than for breaches of the director's duty of good faith to the association.

With respect to disclosure requirements, the Institute of Law Research and Reform also followed the Business Corporations Act and recommended that if a director discloses his interest in a contract but does not vote on it, the contract will not be voidable, nor will the director be required to account for any profits realized thereby.[80]

The Institute of Law Research and Reform did not recommend that the Business Corporations Act be followed with respect to the appointment and removal of directors. The Business Corporations Act requires new directors to either consent in writing to their appointment or attend the meeting at which they are appointed or elected.[81] It is recommended that this should also be included in a new nonprofit statute as it would provide at least one way of ensuring that new directors have an adequate appreciation for their duties and responsibilities. With respect to the removal of directors, the Business Corporations Act provides a statutory method of removal, while Bill 54 leaves it as a matter to be determined in the by-laws.[82] It is recommended that a statutory method of removal be provided as it ensures that a method will be available if needed.

Finally, with the exception of the area of the appointment and removal of directors, it is submitted that the recommendations made by the Institute of Law Research and Reform are appropriate for nonprofit organizations in Alberta and it is recommended that they be adopted for three reasons. First, a higher standard of care than that applicable to directors and officers of business corporations is unnecessary and could be detrimental. It is submitted that it is unnecessary because the standard required of directors and officers entrusted with the responsibility of shareholders' money is arguably stringent enough for the directors and officers entrusted with the responsibility of members' money, and the money of other donors and contributors. A higher standard could be detrimental because it could deter competent and qualified individuals from serving on the boards of nonprofit organizations. Second, the standard recommended by the Institute removes the subjectivity of the common law duty of care, diligence and skill which imposes a higher standard on some directors than others,[83] while retaining a sufficient degree of subjectivity which could take into consideration the voluntariness of most directorships of nonprofit organizations.[84] And third, the consistency of standards between the nonprofit and business corporation statutes will be useful as the law is applied and interpreted in the courts.

e) The Rights of Members

If it is accepted that the definition of a legal right is one which is "recognized and protected by the particular legal system in question"[85] then the rights of members of nonprofit organizations in Alberta are inconsistent, sporadic, and uncertain. The existing nonprofit legislation in Alberta provides for the more technical aspects of membership, including eligibility for membership, the payment of fees, voting, meetings, the election of directors, and resolutions. An organization's by-laws may also provide for certain aspects of membership, including admission and termination. For example, the Societies Act requires a society to include in its by-laws provisions regarding terms of admission, withdrawal, and expulsion of members.[86] However, not all nonprofit statutes contain this requirement, nor do all Alberta's nonprofit statutes provide consistently for the rights, obligations and remedies available to members of the organizations formed under them.

The approach taken in the reformed business corporations statutes[87] has been to devise a system of procedural remedies rather than to focus on an enshrinement of rights. In an apparent adherence to this approach, the Institute of Law Research and Reform recommended that a system of procedural remedies be implemented for nonprofit organizations.[88] The remedies vary in nature and complexity and are designed to address the different kinds of problems which can occur in the operation of an incorporated entity. It is submitted that this is a useful way to approach the issues since it recognizes the diversity of problems which arise in a corporate setting. Following is a list of these remedies which will be elaborated upon below:

1. the duty to be fair
2. investigations
3. derivative actions
4. compliance orders
5. the oppression remedy
6. the appraisal remedy
7. the unanimous shareholders agreement.

First, the Institute recommended that individual nonprofit organizations should be required to address matters of membership admission, transfer, and termination, and that the statute should not "intrude into private affairs by attempting to regulate the general conditions of membership established by" an organization.[89] However, the Institute also recommended that where an organization "confers upon anyone the power of terminating memberships (as differentiated from providing for automatic termination by lapse of time or failure to attend meetings or pay levies), the power should be exercised in accordance with natural justice."[90] It is submitted that the Institute's recommendation that the rules of natural justice be observed with respect to the termination of membership is appropriate and should be adopted for all nonprofit organizations in Alberta. However, it is also submitted that the term "natural justice" is inappropriate as being unfamiliar to "legally unsophisticated users," the acknowledged target group of the proposed statute.[91] It is therefore recommended that the proposed section be expanded to enumerate the rules of natural justice, or alternatively that a different term be used, followed by a similar specification of the rules of natural justice. For example, the "duty to be fair" is arguably a term which would more readily convey the intended meaning to the legally unsophisticated user than does the term "natural justice."

The other recommendations made by the Institute of Law Research and Reform with respect to membership were borrowed from the law of business corporations and relate to the control of the organization. First, the Institute recommended that current members and members whose memberships terminated within a year preceding an application to the Court, be entitled to apply to the Court for an order for an investigation of an organization to determine whether there had been any fraud, dishonesty or oppression in the management of the organization.[92] The Institute has also recommended that the Registrar of Corporations be entitled to apply for an investigation with respect to organizations which have both an income and a liquidation distribution restriction.[93] Only two of Alberta's nonprofit organization statutes presently provide for an investigation into the management of the organizations formed under them, these being the Companies Act and the Agricultural Societies Act.[94] It is therefore submitted that the recommendation made by the Institute of Law Research and Reform with respect to members' applications for investigations is appropriate and it is recommended that it be adopted for all of Alberta's nonprofit organizations. The availability of this remedy would provide some measure of protection for members and the public interest where there is reason to believe that there has been fraud, dishonesty, or oppression in the management of an organization. Making the remedy applicable to all nonprofit organizations would provide consistency in the law for nonprofit organizations.

A second corporate law remedy which the Institute has recommended should be made applicable to nonprofit organizations is the derivative action.[95] This would permit members and former members, directors and officers, former directors and officers, and any other person deemed proper by the Court, to apply to the Court of Queen's Bench for permission to commence an action on behalf of the organization or to intervene in an ongoing action on behalf of the organization. Although available to business corporations, this remedy is not presently available under any of Alberta's nonprofit statutes. This remedy provides complainants with an opportunity to protect the interests of an organization when management either fails or refuses to do so. It is submitted that the recommendation by the Institute to make this remedy available to nonprofit organizations is appropriate and it is recommended that it be adopted for all Alberta's nonprofit organizations. It not only provides members and other complainants with an opportunity to take necessary and appropriate steps to protect an organization which is not being properly protected by management, it also simplifies the common law procedure,[96] thereby ensuring that it will be more widely used.

The Institute of Law Research and Reform has also recommended that the compliance order, currently available to shareholders in business corporations, be made available to members of nonprofit organizations.[97] The compliance order would simply require the directors and officers of an organization to comply with the statute, the regulations, and the organizations's by-laws. It is submitted that this recommendation would provide a useful remedy for Alberta's nonprofit organizations.

The Institute of Law Research and Reform did not recommend that the oppression remedy be made available to nonprofit organizations.[98] They were of the opinion that the oppression remedy is more appropriate for shareholders of business corporations with economic interests at risk. However, it is submitted that the experience in Saskatchewan[99] where the oppression remedy has been included in the Non-Profit Corporations Act[100] demonstrates that the oppression remedy is appropriate for nonprofit organizations. The Saskatchewan cases illustrate that the economic interest of the members of nonprofit organizations can be significant and hence worthy of protection.[101] It is therefore submitted that the oppression remedy is needed and should be made available to all nonprofit organizations in Alberta.

The appraisal remedy or the right to dissent and to be bought out is another remedy presently available to shareholders of business corporations. The Institute of Law

Research and Reform recommended that it be included in new nonprofit legislation for those nonprofit organizations with an income distribution restriction which were formed with share capital.[102] They did not recommend it for nonprofit organizations with an income distribution restriction which were formed without share capital, reasoning that members in those organizations would have no interest to be bought out and would therefore have no need for the remedy.[103] However, it is submitted that the economic interests of members in nonprofit organizations with share capital may be similar to the economic interests of members in nonprofit organizations without share capital,[104] and therefore the right to dissent and be bought out is appropriate for all nonprofit organizations with an income distribution restriction, regardless of the existence or absence of share capital.

One mechanism which is of use to shareholders of business organizations in their efforts to ensure some degree of control over management is the unanimous shareholders agreement.[105] It is submitted that it could also be useful for the members of nonprofit organizations both as a means of dividing corporate powers upon set up and as a means of resolving problems caused by a difficult or unco-operative board of directors. The unanimous shareholders agreement is advantageous also because it is a mechanism which, unlike the other remedies discussed above, does not involve the courts.

It is therefore less complicated and less expensive to use. Accordingly, it is recommended that the unanimous shareholders agreement be made available for use by Alberta's nonprofit organizations.

4. Conclusion

In conclusion, it is submitted that the implementation of the recommendations made above will result in a more comprehensive and consistent statutory scheme for nonprofit organizations in Alberta. The resulting legal certainty will ensure the efficient management of nonprofit organizations and will enable the nonprofit community to continue to meet the increasingly voluminous and complex needs of the society within which it operates.

FOOTNOTES - CHAPTER IV

1. S.A. 1981, c.B-15.

2. R.S.A. 1980, c.C-20.

3. Bill 54, The Volunteer Incorporations Act, 21st Legislature, 2nd Session.

4. R.S.A. 1980, c.S-18.

5. Agricultural Societies Act, R.S.A. 1980, c.A-12; Cemetery Companies Act, R.S.A. 1980, c.C-3; Religious Societies' Land Act, R.S.A. 1980, c.R-14; Women's Institute Act, R.S.A. 1980, c.W-13.

6. Supra n.3.

7. Institute of Law Research and Reform, "Draft Non-Profit Corporations Issues Paper" unpublished, September 29, 1986, Edmonton, Alberta at 1. See also Chapter I, infra, at p. 2 and n. 8.

8. This is based on 1987 statistics from Alberta's Department of Consumer and Corporate Affairs, Alberta's Department of Agriculture, and the Alberta Women's Institutes provincial office. In September 1987 there were 12,637 societies, 559 nonprofit companies, 1,587 religious societies, 290 agricultural societies, 237 cemetery companies and 156 women's institute branches.

9. The Institute of Law Research and Reform began its study of Alberta's nonprofit organizations in 1981. It made proposals for a new nonprofit statute in March 1987, proposals which were introduced in the Alberta Legislature in June 1987 in the form of Bill 54. (Supra n.3). The Minister of Consumer and Corporate Affairs, the Honourable Elaine McCoy, will be appointing a 7-member Task Force in the spring of 1988 to study Bill 54, the proposed Volunteer Incorporations Act, in order to obtain a "user's perspective" of the bill. The future of nonprofit legislation in Alberta will therefore not be determined until the Task Force presents its report to the Minister in 1989.

10. Robert S. Lesher, "The Non-Profit Corporation - A Neglected Stepchild Comes of Age" (1967) The Business Lawyer 951.

11. Id. at 961.

12. Id.

13. Supra n. 3 at s.2.

14. Cemetery Companies Act, R.S.A. 1980, c.C-3, s.2.

15. Supra n. 3 at s.34.

16. R.S.A. 1980, c.C-3, s.2.

17. Id. at s.10.

18. Cemetery Companies Act, R.S.A. 1980, c.C-3, s.10(1).

19. S.A. 1981, c.B-15.

20. Nonprofit Corporation Law, California Corporation Code 5002-10083 (West Supp. 1979).

21. W.T. Fryer and D.R. Haglund, "New California Nonprofit Corporation Law: A Unique Approach" [1979] 7 Pepperdine L. Rev. 1 at 7 & 8. See also Chapter III Part 3 Limitations on Purposes, infra, with respect to the discussion of the functional approach to the purposes for which a nonprofit organization can be established.

22. Id. at 7 - 8.

23. Id. at 8 - 9.

24. California Law Revision Commission, Recommendation Relating to Nonprofit Corporation Law (November 1976) 2224 - 2226.

25. Id. at 2226.

26. Id . at 2226 - 2227.

27. Institute of Law Research and Reform, Proposals for a New Incorporated Associations Act Report No. 49 (March 1988) Edmonton, Alberta, at 24 - 25.

28. Supra n. 3 at ss. 1(v), 65, & 67.

29. Supra n. 27 at 25.

30. Supra n. 26.

31. Supra n. 27 at 20 - 21.

32. Michael C. Hone, "California's New Nonprofit Corporation Law - An Introduction and Conceptual Background" [1979] 13 University of San Francisco L. Rev. 733 at 751.

33. *Supra* n. 27 at 22.

34. *Id*. at 21.

35. Bill C-10, 32nd Parliament, 1st Session.

36. S.S. 1979, c.4.1.

37. S.C. 1974-75-76, c.33.

38. Peter A. Cumming, "Corporate Law Reform and Canadian Not-For-Profit Corporations" (1974) 1 The Philanthropist 10 at 10 and 20. It is worth noting that the C.B.C.A., while once advanced business corporation legislation, is now dated in areas such as insider trading, and prohibited financial assistance, and is no longer being followed in other jurisdictions updating their business corporation law. However, the basic concept remains sound, that is, that nonprofit corporation law has much to gain by the advances being made in business corporation law.

39. *Supra* n. 24 at 2228.

40. In addition to those already cited, see Daniel Wm. Fessler, "Codification and the Nonprofit Corporation: The Philosophical Choices, Pragmatic Problems, and Drafting Difficulties Encountered in the Formulation of a New Alaska Code" [1982] 33 Mercer L. Rev. 543 at 544; Louis P. Haller, "The Model Non-Profit Corporation Act" [1957] IX Baylor L. Rev. 309 at 316; and *supra* n. 10 at 961.

41. Howard L. Oleck, "Nature of Nonprofit Organizations in 1979" (1979) 10 U. Toledo L. Rev. 962 at 972 - 976.

42. *Id*. at 975 - 976.

43. *Id*. at 976.

44. R.S.A. 1980, c.S-18, s.4(1).

45. R.S.A. 1980, c.C-20, s.200(1).

46. R.S.A. 1980, c.C-3, s.10(3). See Also Chapter III, n. 23.

47. R.S.A. 1980, c.R-14, s.24(5) & (6).

48. R.S.A. 1980, c.A-12, s.41.

49. R.S.A. 1980, c.W-13.

50. Supra n. 27 at 26.

51. Id.

52. Id. at 26 & 27.

53. Societies Act, R.S.A. 1980, c.S-18, s.7; Cemetery Companies Act, R.S.A. 1980, c.C-3, s.2(4); Agricultural Societies Act, R.S.A, 1980, c.A-12, s.3(5); Women's Institute Act, R.S.A. 1980, c.W-13, s.9.

54. Companies Act, R.S.A. 1980, c.C-20, s.15; Religious Societies' Land Act, R.S.A. 1980, c.R-14, ss.11 & 12.

55. See Chapter III Part 2.

56. Supra n. 38 at 21.

57. Id.

58. Id. at 21 and 22. Note, "Permissable Purposes for Nonprofit Corporations" (1951) 51 Columbia L. Rev. 889 at 897.

59. Supra n. 38 at 22.

60. Supra n. 27 at 31.

61. See Chapter III Part 3 at 68 - 69.

62. R.S.A. 1980, c.S-18, s.3(1); R.S.A. 1980, c.A-12, s.2; R.S.A. 1980, c.W-13, s.2; R.S.A. 1980, c.C-3, s.2(1); R.S.A. 1980, c.R-14, s.11(1).

63. See Chapter III Part 3 at 70 - 83.

64. Id.

65. Id. at 74 - 79.

66. Supra n. 27 at 31.

67. Id. at 32.

68. Id. at 34.

69. Id. at 33.

70. Supra n. 27 at 34 - 35.

71. S.A. 1981, c.B-15, Part 9.

72. See Chapter III, Part 4, at 86 - 88.

73. See Chapter III, Part 4, at 88.

74. See Chapter III, Part 4, at 90.

75. See Chapter III, Part 4, at 89.

76. Supra n. 38 at 32; supra n. 7 at 52 - 56.

77. S.A. 1981, c.B-15, s.117(1).

78. Supra n. 27 at 55.

79. Id.

80. See Chapter III, Part 4, at 96 - 98.

81. See Chapter III, Part 4, at 100 - 101.

82. See Chapter III, Part 4, at 101 - 102.

83. See Chapter III, Part 4, at 93 - 94.

84. Id.

85. D.M. Walker, Oxford Companion to Law (1980) 1070.

86. R.S.A. 1980, c.S-18, s.5(4).

87. See Chapter III, Part 5, at 123.

88. Supra n. 27 at 47 and 60 - 66.

89. Id. at 47.

90. Id.

91. Id. at 20 & 21.

92. Supra n. 27 at 61 & 62.

93. Id.

94. See Chapter III, Part 5, at 138 - 139.

95. See Chapter III, Part 5, at 139 - 141.

96. See Chapter III, Part 5, at 140.

97. Supra n. 27 at 67.

98. Supra n. 27 at 63 - 64.

99. See Chapter III, Part 5, at 141 - 142.

100. S.S. 1979, c.N.4.1, s.215.

101. See Chapter III, Part 5, at 143 - 146.

102. Supra n. 27 at 65 - 66.

103. Id.

104. See Chapter III, Part 5, at 146 - 149.

105. See Chapter III, Part 5, at 149 - 150.

CHAPTER V - CONCLUSION

Nonprofit organizations have evolved as an unrelated collection of associations from Medieval times to the present. Although they have developed into more sophisticated entities than their predecessors and have evolved common attributes, they remain a legally unrelated collection of associations. This situation, which is characterized by overlap, inconsistency, and confusion, should be remedied, and indeed can be remedied now because of the Alberta Government's desire to dispose of the remnants of the Companies Act pursuant to the enactment in 1981 of the Business Corporations Act. This presents a unique opportunity to standardize and modernize a significant area of the law. This opportunity should be taken advantage of for three reasons. First, the nature of the evolution and development of nonprofit organizations has been such that reform has not been a significant issue until now. The history of nonprofit organizations both in England and in Canada is characterized by diversity, a diversity which has left each type of nonprofit organization relatively distinct and self-sufficient. However, the distinctiveness and self-sufficiency have become less significant as the pursuits of nonprofit organizations and the society within which they operate have become increasingly sophisticated and complex. Nonprofit organizations, which are still characterized by diversity, also share many common traits and needs. It is the commonality in their corporate nature which necessitates that advantage should now be taken of the opportunity for standardizing. The commonality is especially significant in the areas which are essential to or definitive of the nature of a nonprofit entity - the distribution constraint, the right to incorporate, limitations on purposes, the duties and responsibilities of directors and officers, and the rights of members.

The second reason that Alberta's nonprofit laws should be reformed is the opportunity which now exists to benefit from the recent reforms in business corporation law. In the past 15 years there have been significant advances made in several areas of business corporation law, many of which have either direct or modified application to nonprofit organizations. These advances have also had the advantage of, in some cases, a few years of practical application, thereby providing drafters of new nonprofit laws with a basis for determining their applicability and usefulness.

The third reason that advantage should be taken of the opportunity to reform Alberta's nonprofit laws is the increasing significance of nonprofit organizations in terms of their numbers, their activities, the number of people who are involved with them as employees, volunteers and beneficiaries, and especially in the context of the role which they play in our society. It has been said on several occasions in this thesis and elsewhere by many eminent commentators that nonprofit organizations are significant participants in our society. They provide a seemingly unlimited range of benefits and services that might otherwise be unavailable; they meet a wide variety of needs and respond to a diverse array of requests. They do so with often limited resources for unlimited needs, for no other reason than that the need exists and that it must therefore be met. This adherence to principles of altruism in a sophisticated world where such principles are often neglected or forgotten deserves recognition.

For these reasons it is submitted that Alberta's laws governing nonprofit organizations must be reformed - they must be brought to the standard of the 80's for the benefit of the nonprofit organizations themselves and for the benefit of the society within which they operate and which they serve.

In addition to it being desirable that the laws regarding nonprofit organizations be reformed, it is also feasible. Both the diversity of pursuits, which historically and currently has set nonprofit organizations apart, and the commonality of corporate traits, which has created some common bonds, can be adequately accommodated in a modernized and standardized statutory regime. Such a regime could be cognizant of the various categories of nonprofit organizations, the expectations and rights of those who are members and beneficiaries of and contributors to nonprofit organizations, and the responsibilities of those who direct and control the organizations. Such a regime could take one of two possible forms. First, it could be in the form of a general statute which is bridged to the individual, specialized statutes, or second, it could be in the form of one comprehensive statute with one part of general application to all nonprofit organizations, and two other parts of specific application to the different categories of nonprofit organizations. The categories with most relevance to the Alberta nonprofit community would be those based on the prohibition against the distribution of income, which have been proposed in Bill 54, the Volunteer Associations Act. One category would include all those organizations which would be prohibited from distributing income during the existence of the organization. The other category would include all those organizations which would be prohibited from distributing income both during the existence of the organization and upon its dissolution. The use of these two categories would accommodate both membership or mutual benefit organizations in which there is no need to prohibit distribution upon dissolution, and public benefit or charitable organizations in which it is necessary to prohibit the distribution of income both during the existence of the organization and upon its dissolution.

The second and third key features of a rationalized statutory regime for Alberta's nonprofit organizations would be the right to incorporate and the right to pursue any lawful activity. These features could be incorporated into a general statute which was bridged to the specialized statutes, as well as into a comprehensive statute. In the case of the bridging statute it is likely that the specialized statutes would provide for limitation on purposes. It is submitted that this would not be incongruous with the general statute's absence of such limitations since those organizations desirous of unlimited purposes could choose to incorporate under the general statute, while those unconcerned with unlimited purposes could choose to incorporate under the specialized statute most suited to their needs. Similarly with the comprehensive statute, an absence of limitations on purposes would be appropriate for all organizations, regardless of their concerns with respect to limitations, since those who needed or wished to limit their purposes could do so in their constitution and by-laws.

The fourth key feature of a reformed statutory regime for Alberta's nonprofit organizations would be the imposition of an objective standard of care for directors and officers which also contains an element of subjectivity. The objective standard of care, which is now applicable in business corporation law, would measure directors and officers against the reasonably prudent person and would eliminate a consideration of the actual skills and abilities of individual directors and officers, thereby applying a uniform standard to all directors, regardless of their experience and training. The element of subjectivity which is arguably contained in the phrase "comparable circumstances", would allow for a consideration of the fact that directors and officers of nonprofit organizations are primarily volunteers who serve in their spare time out of a sense of public duty. It would also go some way to placating those concerned that an inordinately high standard of care may discourage competent individuals from serving on the boards of nonprofit organizations.

A fifth key feature of revised nonprofit legislation would be the protection of members' rights. This would be accomplished by the implementation of a system of procedural remedies, each remedy of which is specific to a different type of problem. It would include an entrenchment of the duty to be fair, as well as six business corporation law remedies including investigations, derivative actions, compliance orders, the oppression remedy, the appraisal remedy, and the unanimous shareholders agreement. This systematic approach to members' remedies is recommended because of its recognition of the diversity of issues in which members and nonprofit organizations can become involved. It is also recommended because of its consistency with business corporation law. These remedies have been used and have proved useful in a business corporation setting, and it is submitted that that will prove advantageous insofar as the remedies and the business corporation experience are relevant and applicable to nonprofit organizations.

Finally, it is submitted that the standardization and modernization of Alberta's nonprofit laws does not have to result in a sterilization of those laws or the organizations which are established pursuant to them. The vitality, integrity and diversity of the nonprofit community can be protected and preserved and encouraged to flourish by a statutory approach which removes the barriers of antiquated, restrictive, and confusing laws, and replaces them with laws which provide organizations with the freedom to pursue any lawful activity, as well as providing the necessary safeguards to ensure that those pursuits are undertaken with due regard for the rights and interests of donors, members, and beneficiaries.

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APPENDICES

Joint Stock Companies Act
1856 (U.K.) 19 & 20 Vict. c.47

XXXVII. No Company that is not for the Time being carrying on a Trade or Business having Gain for its Object shall be entitled, without the Sanction of the Board of Trade, to hold more than Two Acres of Land, but the Board of Trade may empower any such Company to hold Lands in such Quantity and subject to such Conditions as they think fit, and may for that Purpose grant a Licence in the Form marked G. in the Schedule hereto, or to the like Effect.

Companies Act
1862 (U.K.) 25 & 25 Vict., c.89

21. No Company formed for the Purpose of promoting Art, Science, Religion, Charity, or any other like Object, not involving Acquisition of Gain by th Company or by the individual Members thereof, shall, without the Sanction of the Board of Trade, hold more than Two Acres of Land; but the Board of Trade may, by Licence under the Hand of One of their Principal Secretaries or Assistant Secretaries, empower any such Company to hold Lands in such Quantity and subject to such Conditions as they think fit.

Companies Act, 1913
S.A. 1913, c.20

2. Where any association has been or is about to be formed as a limited company if it proves to the registrar that it is formed for the purpose of promoting art, science, religion, charity or any other useful object, and that it is the intention of such association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association the registrar may direct such association to be registered with limited liability without the addition of the word "limited" to its name and such association may be registered accordingly and upon registration shall enjoy all the privileges and be subject to the obligations imposed by The Companies Ordinance and by this Act on limited companies with the exception that none of the provision thereof that require a limited company to use the word "limited" as a part of its name or to publish its name or to send a list of its members, directors, or managers to the registrar shall apply to an association so registered; the direction by the registrar may be made upon such conditions and subject to such regulations as the registrar thinks fit to impose and such conditions and regulations shall be binding on the association and may at the option of the registrar be inserted in the memorandum and articles of association or in both or in one of such documents.

4. Where any association has been or is about to be formed as a limited company, if it proves to the satisfaction of the registrar that it is formed solely for the purpose of promoting recreation amongst its members and that it is the intention of such association to apply the profits, if any, or any other income of the association inn promoting its objects and that it is not formed with gain for its object and that no dividend shall be divided among the members of the association and that its capital does not exceed six thousand dollars the registrar may direct such association to be registered with limited liability without the addition of the word "limited" to its name and such association may be registered accordingly and shall enjoy all the privileges and be subject to the obligations of The Companies Ordinance and of this Act with the exception that none of the provisions thereof that require a limited company to sue the word "limited" as a part of its name or to publish its name or to send in to the registrar any of the returns prescribed by this Act shall apply to an association so registered and that the total fee for registering such an association shall be twenty-five dollars.

Companies Act
R.S.A. 1980, c.C-20

PART 9

PROVISIONS APPLYING TO COMPANIES WITH OBJECTS OTHER THAN THE ACQUISITION OF GAIN

200(1) When an association has been or is about to be formed as a limited company, if it proves to the Registrar that it is formed for the purpose of promoting art, science, religion, charity or any other useful object, and that it is the intention of the association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association, the Registrar may direct the association to be registered with limited liability without the addition of the word "limited" to its name and the association may be registered accordingly.

202(1) When an association has been or is about to be formed as a limited company, if it proves to the satisfaction of the Registrar that it is formed for the sole purpose of promoting recreation among its members and that it is the intention of the association to apply the profits, if any, or any other income of the association in promoting its objects and that it is not formed with gain for its object and that no dividend shall be divided among the members of the association, the Registrar may direct the association to be registered with limited liability without the addition of the word "limited" to its name, and the association may be registered accordingly.

Companies Act
S.C. 1917, c.25, s.4 amending R.S.C. 1906, c.79 s.7

4. The principal Act is hereby amended by adding thereto the following sections, 7a and 7b:-

"7a. (1) When the application is for the creation of a corporation to carry on in more than one province of Canada, without pecuniary gain, objects of a national patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like, the applicants for such letters patent, who must be of the full age of twenty-one years, shall file in the Department of the Secretary of State an application setting forth:-

" (a) The proposed corporate name, which shall not be that of any other known corporation, association or body incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable;

" (b) The purposes for which incorporation is sought;

" (c) the place within Canada where its chief office is to be situated;

" (d) The names in full and the address and calling of each of the applicants, with special mention of the names of not more than fifteen and not less than three of their number, who are to be the first or provisional directors or trustees of the corporation.

Mechanics and Literary Institutes Act
S.A. 1908, c.16

5. The objects of institutes organized under this Act shall be to encourage mechanics, manufacturers and arts generally:

(a) By having evening classes organized for the imparting of practical instruction to its pupils;

(b) By establishing a library or books on one or more of the following subjects, viz.: mechanics, manufacturers, agriculture, horticulture, philosophy, science, the fine and decorative arts, history, travels, poetry, biography and fiction;

(c) Establishing a reading room.

Benevolent Societies Act
S.A. 1922, c.159

3.-(1) Any five or more persons of full age may become incorporated under this Act for any benevolent or provident purpose or for any other purpose not illegal save and except for the purpose of trade or business.

The Societies Act, 1924
S.A. 1924, c.11

4.(1) Five or more persons may become incorporated under this Act for any benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting or other useful purpose, but not for the purpose of carrying on any trade or business.

Societies Act
R.S.A. 1980, c.S-18

3(1) Five or more persons may become incorporated under this Act for any benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting or other useful purpose, but not for the purpose of carrying on a trade or business.

4(1) No society shall have a capital divided into shares or declare any dividend or distribute its property among its members during the existence of the society.

7. The Registrar may refuse incorporation for any reason that appears to him to be sufficient.

Agricultural Societies Act
R.S.A. 1980, c.A-12

2 The objects of a society shall be to encourage improvement in agriculture, horticulture, homemaking and the quality of life in the agriculture community

(a) by holding meetings for lectures and demonstrations and for the discussion of subjects connected with the theory and practice of any of those pursuits;

(b) by promoting and encouraging conservation of natural resources, including soil conservation, reforestation and rural beautification;

(c) by holding exhibitions or competitions at which prizes may be awarded for

(i) excellence in the raising or introduction of livestock,

(ii) the production of grains and all kinds of vegetables, plants, flowers and fruits,

(iii) proficiency in farming and homemaking operations and in skills related thereto,

(iv) the invention or improvement of agricultural machines or implements,

(v) home manufactures and works of art, and

(vi) excellence in agricultural production or operation;

(d) by holding auctions or other sales of farm products, home manufactures and products and works of art;

(e) by developing activities to encourage and interest boys and girls in the work of agricultural societies;

(f) by supporting and co-operating with other associations and organizations to improve farm production;

(g) by supporting or providing facilities to encourage activities intended to enrich rural life;

(h) by conducting or promoting horse races when authorized to do so by a by-law of the society.

3(5) If the Minister approves an application to form a society and the by-laws accompanying that application, he may issue a certificate of incorporation in the prescribed form incorporating the subscribers to the application as a society under the name "The........ Agricultural Society".

28(1) The funds of a society, however derived, shall not be expended for objects inconsistent with those authorized by this Act.

41(6) If there is a surplus either in property or money after paying the expenses of liquidation and all the liabilities of the society, the liquidator shall at the time and place, and on the notice and in the manner the Director directs, call a meeting of all persons who are members of the society immediately before its dissolution, and the meeting, by resolution, may authorize the liquidator to dispose by way of gift of all or any of the surplus to an association or body engaged in community service in the locality in which the society operated.

Cemetery Companies Act
R.S.A. 1980, c.C-3

2(1) Any 7 or more persons who

(a) have subscribed stock to an amount adequate for the purchase of the ground required for a cemetery,

(b) have executed an application as required by subsection (2) and have filed the application or a duplicate thereof in the office of the Registrar,

(c) have paid to the treasurer of the proposed company 25% of the capital stock intended to be raised, and

(d) have deposited in the office of the Registrar a certificate of the treasurer that there has been paid to the treasurer 25% of the capital stock intended to be raised,

may form a company for the purpose of establishing one or more public cemeteries outside the limits of a town or village or within the limits of a town or village if permission is given by by-law of the town or village for the establishment of one or more public cemeteries within its limits.

(4) The Registrar may refuse incorporation for any reason that appears to him to be sufficient.

10(1) Out of the proceeds of the sale of burial sites made by the company, the company, to such of its shareholders as do not desire to take land in the cemetery to the full extent of the stock subscribed and paid for by them,

(a) may pay interest on their paid-up stock not represented by land in the cemetery at such rate as may be agreed on not exceeding 8% per year, and

(b) may also repay to those shareholders the amount of paid-up stock held by them and not represented by land in the cemetery.

(2) Each shareholder referred to in subsection(1) shall be deemed to be a shareholder and entitled to all the rights of shareholders in respect of the shares of the capital stock of the company held by him, fully paid up, and not represented by land in the cemetery, s=until those shares are repaid to him by the company, and on the repayment to him of a share he shall cease to be a shareholder in respect of that share.

(3) Except as provided in this section, no dividend or profit shall be paid by the company to a member thereof.

11(1) Subject ot section 10, one half of the proceeds, of all sales of burial sites made by the company shall be first applied to the payment of the purchase money of the land acquired by the company and the remainder to preserving, improving and embellishing the land as a cemetery and to the incidental expenses of the company.

(2) After payment of the purchase money the proceeds of future sales shall be wholly applied to the preservation, improvement and embellishment of the cemetery and to the incidental expenses thereof.

Religious Societies' Land Act
R.S.A. 1980, c.R-14

11(1) When a congregation of a church or religious denomination, not otherwise incorporated, desires to be incorporated for the purpose of holding and dealing with real and personal property, a meeting of the congregation may be called for the purpose of considering the proposed incorporation.

12(1) The declaration of incorporation shall thereupon be delivered in duplicate to the Registrar together with a fee in the amount prescribed by regulation and, if it is in substantial compliance with section 11 and if the proposed corporate name does not conflict with that of any other congregation already incorporated, the Registrar

(a) shall certify under his hand and seal of office that the congregation is incorporated, and

(b) shall endorse a certificate to the same effect on, or attach it to, the duplicate of the declaration of incorporation and return the duplicate to the corporation.

14(1) An incorporated congregation may acquire real and personal property,

(a) by purchase or gift, or

(b) by devise or bequest if the devise or bequest is made at least 6 months before the death of the testator,

and hold it for the purposes of the congregation, and may alienate the property at pleasure.

24(5) If there is a surplus of assets after all the liabilities of the former corporation and liquidation expenses have been paid in the winding up of a congregation incorporated under this Act, the liquidator or the person appointed under subsection (3)(a)

(a) shall, on reasonable notice, which may include advertising in a newspaper having circulation in the general geographical area inhibited by the members of the congregation, call a meeting of the persons who were members of the congregation at the time the application was presented, and that meeting may, by resolution, direct the person to distribute the surplus to one or more religious or charitable organizations named in the resolution, or

(b) may, if no resolution is passed pursuant to and in accordance with clause (a), apply by originating notice to the Court of Queen's Bench for an order governing the disposition of the surplus and the judge hearing the application may make any order he considers just, including an order directing that the surplus be vested in the ultimate heir under the Ultimate Heir Act.

Women's Institute Act
R.S.A. 1980, c.W-13

2 The objects of the institutes are the improvement of social conditions in rural and other communities by means of

- (a) the study of
    - (i) home economics, including home nursing, household science, sanitation, food values, sick room cookery, house furnishing, sewing and other matters, and
    - (ii) child welfare, prevention of disease, local neighbourhood needs, industrial and social conditions,
- (b) the establishment of institutes as social and educational community centres and the provision of a welcome to new settlers in the community,
- (c) the encouragement of agriculture and improvement of agricultural conditions, and
- (d) the holding, establishing and maintenance of demonstrations, lectures, short course schools, travelling and other libraries, exhibitions, competitions, meetings, conventions and such other utilities and attractions as may from time to time be declared useful for the promotion of the foregoing, or any of them.

9(1) Eight or more married or single women who are over 16 years of age, residents of the same vicinity and not members of any other institute may proceed to the formation and incorporation of an institute in the manner set out in this section.

(7) The institute is capable of receiving and holding any real or personal property by grant, gift, legacy or devise and of investing it or the proceeds thereof, and of using it or any part of it, subject to the provisions of this Act, in the furtherance of the objects of the institute.

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DECLARATION OF INCORPORATION

Pursuant to "The Religious Societies' Lands Act"

The Congregation of the "Immanuel Lutheran Church of Tomahawk, Alberta", of Tomahawk, in the Province of Alberta, desires incorporation pursuant to "The Religious Societies' Lands Act" upon the following terms, that is to say:

1. The Said congregation affiliates with the Alberta - British Columbia District of the Lutheran Church - Missouri Synod, which is a District of the Lutheran Church - Missouri Synod whose headquarters are in the City of St. Louis in the State of Missouri, in the country of The United States of America.

2. The persons who, according to the rules of the congregation, are entitled to vote in respect of church business are all active male members of the Church, who are of the voting age of twenty-one (21) years.

3. The proposed corporate name is "Immanuel Lutheran Church of Tomahawk, Alberta".

4. The officers who shall exercise the powers of the body corporate in any dealing with the property thereof are the Church Council.

    (a) The Church Council shall consist of the Pastor (or Pastors), the President, Secretary, three Trustees and three Elders.

(b) The President shall be elected for a term of one year and the Secretary, Treasurer, Trustees, and Elders shall be elected for a term of three years.

5. The rules to be complied with before any property of the congregation shall be dealt with by the officers thereof are as follows:

> The Church Council shall not buy, sell or encumber real estate unless authority is given by the congregation. Nor shall it, without authority incur any extra budegetary financial obligation exceeding Fifty ($50.00) Dollars.

6. Twenty-five (25%) per cent of the active members at any regularly called congregational meeting shall constitute a quorum. Special meetings can only be conducted if at least one half of the members are present.

Passed at a meeting of the congregation by those entitled to vote in respect of church business, which meeting was held on the 10th day of March, A. D. 1963, at the Hamlet of Tomahawk, in the Province of Alberta.

Herman Welk

PRESIDENT (Herman Welk)

Herman Steinke

SECRETARY (Herman Steinke)

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Cem. 232

AUG 4 - 1977
OFFICE OF THE REGISTRAR OF COMPANIES
PROVINCE OF ALBERTA

THE CEMETERY COMPANIES ACT

FORM A

(Section 3 (2)

REGISTERED
AUG 9 1977
THE REGISTRAR OF COMPANIES
PROVINCE OF ALBERTA

APPLICATION

WE, the undersigned, hereby declare:

1. THAT we desire to form a Company under The Cemetery Companies Act and that:
   a) The name of the Company is: "RIFE MEMORIAL UNITED CHURCH CEMETERY"
   b) The object of the Company is to establish maintain and supervise and take care of all matters related to a cemetery located on the S.W. corner of S.W. 1/4 of 16-60-1-W.4
   c) The operations of the Company are to be carried on in the Municipal District of Bonnyville

2. THAT we subscribe to stock to an amount adequate to the purchase of the ground required for the cemetery;

3. THAT we paid to the treasurer of the proposed Company twenty-five (25%) percent the capital stock intended to be raised;

4. THAT we deposited in the office of the Registrar a certificate of the treasurer that there has been paid to the treasurer [illegible] of the capital stock intended to be raised;

5. THAT we do hereby agree that the capital stock of the Company shall be $ 140.00 dollars divided into Seven (7) shares of $ 20.00 dollars per share, each entitling the holder to one hundred superficial square feet; and

6. THAT we do hereby further agree
   a) To accept and take the number of shares set by us opposite our respective signatures;
   b) To pay the calls thereon according to the provisions of The Cemetery

Aug 16/77
C. [illegible]

Companies Act and the rules, regulations and by-laws of the Company made in that behalf.

DATED this 10 day of May, A.D. 1977.

SIGNATURE OF WITNESSES	SIGNATURE, ADDRESS AND OCCUPATION OF EACH APPLICATION	NUMBER OF SHARES BY EACH APPLICANT
	Harry Armagost HARRY ARMAGOST Rife, Alberta	One Class "A"
	ALMA ARMAGOST - Housewife Rife, Alberta	One Class "A"
	Don Ford DON FORD	One Class "A"
	Maryann Ford MARYANN FORD - Housewife	One Class "A"
	OLIVER SANDMEYER Rife, Alberta	One Class "A"
	ESTER SANDMEYER - Housewife Rife, Alberta	One Class "A"
	VALMAI HARPER - Housewife Hoselaw, Alberta	One Class "A"

1977 S
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ANIES
ERIA

[illegible]

[illegible]

[illegible]

Lucien Dubuc [illegible]

Maude Bowman 9917 - 111 St. [illegible]

hereby apply for incorporation as an Association under "The Act Respecting Benevolent and other Societies."

The name of the Association shall be "THE EDMONTON MUSEUM OF ARTS".

The objects for which the Association is to be formed are:

To promote the knowledge and enjoyment of and cultivation of the fine Arts and to preserve historic relics. No pecuniary gain or profit shall accrue from membership in the Association.

[illegible], to [illegible] and [illegible] and to provide lectures, instructions and entertainments in furtherance of the general purposes of the Society. The location of the Association shall be in the City of Edmonton in the Province of Alberta, Canada.

DATED at the City of Edmonton, in the Province of Alberta, this 9th day of August. A.D. 1924.

John A. McDougall

John M. Imrie

Lucien Dubuc

Alberta

CONSUMER AND CORPORATE AFFAIRS CORPORATE REGISTRY

APPLICATION

APR 25 1986
Corporate Registry
Province of Alberta

50239066

WE, the undersigned, hereby declare that we desire to form a society under The Societies Act, R.S.A. 1980, and that:

1. — The name of the society is — Garneau/University Child Care [illegible]Society

2. — The objects of the society are —

(a) To provide for the recreation of the members and to promote and afford opportunity for friendly and social activities.

X (b) To acquire lands, by purchase or otherwise, erect or otherwise provide a building or buildings for social and community purposes.

(c) To encourage and promote amateur games and exercises.

(d) To provide a meeting place for the consideration and discussion of questions affecting the interests of the community.

(e) To carry on a literary and debating club for the discussion of topics of general interest, and to encourage the practice of public speaking among its members.

(f) To procure the delivery of lectures on social, educational, political, economic and other subjects, and to give and arrange musical and dramatic entertainments.

(g) To establish and maintain a library and reading room.

X (h) To provide all necessary equipment and furniture for carrying on its various objects.

(i) To provide a centre and suitable meeting place for the various activities of the community.

(j) Generally to encourage and foster and develop among its members a recognition of the importance of agriculture in the national life.

X (k) To sell, manage, lease, mortgage, dispose of, or otherwise deal with the property of the society.

X (l) To establish and maintain a pre-school child care centre licenced under the Alberta Day Care Regulation, operating as a non-profit organization.

DATED this 24th day of April 19 86

NAME (SIGNATURE)	ADDRESS	OCCUPATION
Susan Jackel SUSAN JACKEL	8715 120 St. Edm	Associate Professor
Burt Krull BURT KRULL	43 Elmgston Cr. St Albert	Chartered Accountant
Hugh Welsh HUGH WELSH	11101 University Ave Edm	[illegible] / Child Care
Lois M. Stanford LOIS M. STANFORD	11208 49 ave, Edmonton	Assoc. Professor
Frederick J. Morrison FREDERICK J. MORRISON	3919 ASPEN DR. W. Edm	PROFESSOR

NAME (WITNESS)	ADDRESS	OCCUPATION
Peter Graf PETER GRAF	5507-116 STREET Edm.	Manager

C.

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1907

CHAPTER 23.

An Act to Incorporate the Historical Society of Alberta.

(*Assented to March 15, 1907.*)

WHEREAS the persons hereinafter named and others have associated themselves together and have formed a society under the name of "The Historical Society of Alberta";

And whereas the said persons have prayed to be incorporated under the name of "The Historical Society of Alberta" and it is expedient to grant their prayer;

Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

1. His Honour George H. V. Bulyea, Hon. Frank Oliver, Hon. A. C. Rutherford, Hon. W. H. Cushing, Hon. C. W. Cross, Hon. W. T. Finlay, John A. McDougall, H. B. Round, R. H. Alexander, George Roy, William Short, Hon. A. L. Sifton, Hon. D. L. Scott, Hon. Horace Harvey, Hon. Chas. A. Stuart, Hon. C. W. Fisher, W F Bredin, A. S. de Rosenroll, John R. Boyle, John T. Moore, E. H. Riley, T. Allan Brick, T. W. Telford, Malcolm McKenzie, J. B. Holden, John R. McLeod, W. C. Simmons, C. Hiebert, John A. Simpson, J. B. Walker, A. J. Robertson, H. W. McKenney, John A. McPherson, J. P. Marcellus, W. F. Puffer, J. W. Woolf, F. A. Walker, J. R. Cowell, A. G. Harrison, George Harcourt, W. A. Griesbach, N. D. Beck, George J. Kinnaird, F. T. Fisher, E. B. Edwards, St George Jellett, George A. Reid, Louis Madore, William Pearce, Rev. J. C. Herdman, John F. Boyce, George A. Ings, Rev. John McDougall, D.D., James Bannerman, Rev. Leo. Gaetz, Sage M. Bannerman, William Cousins, C. A. Magrath, R. L. Nasmith, C. F. P. Conybeare, F. W. G. Haultain, Richard B. Bennett, Dr. R. G. Brett, Howard Douglas, William Whyte, J. S. Dennis, Leverett G. De Veber, Richard A. Wallace, John Herron, James D. Lafferty, A. B. Watt, A. A. Nicholls, Laurence Adamson, Alex Taylor, J. McCaig, J. W. Wallbridge, K. W. McKenzie, T. M. Turnbull, D. W. McDonald, A. M. Calderon, W. S. Robertson, P. E. Lessard, H. A. MacKie, E. C. Pardee, John R. McIntosh, A. F. Ewing, Ernest Brown and John S. Hall, and all other persons who are now and who shall from time to time be and become members of said society are hereby declared to be a body corporate and politic under the name of *"The Historical Society of*

Alberta" and by that name shall have perpetual success and a common seal and may sue and be sued, plead and impleaded, in all courts whatsoever and may purchase, recei by request or donation, and hold property real and person for the use of the society and for more effectually carrying o its objects and may grant, sell, lease, mortgage or dispose such property.

2. The object of the society shall be to encourage the stu of the history of Alberta and Canada, to rescue from oblivi the memories of the original inhabitants, the early missio aries, fur traders, explorers, and settlers of the north an west of Canada, to obtain and preserve narratives in pri manuscript or otherwise of their travels, adventures, labour and observations, to secure and preserve minerals, archaeolog ical curiosities and objects generally illustrative of the civi religious, literary and natural history of the country and establish a museum and library.

3. The society or a council or committee elected by it sha have power from time to time to make by-laws, rules an regulations for the government of the society not inconsisten with this Act.

4. The annual meeting of the society shall be held in eve year during the month of February for the election of office notice of the time and place of such meeting to be given the secretary to each of the members by letter addressed, his or her last known place of abode at least twenty da before the date of such meeting and at such annual meeti members shall be entitled to vote for the election of offic by proxy.

5. The present officers of the society shall be deemed to the officers of the society until their successors are elected.

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THE UNIVERSITY OF ALBERTA

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